CASES

IN THE

Supreme Court of Pennsylvania

BEING THOSE CASES NOT DESIGNATED TO BE REPORTED
BY THE STATE REPORTER

FROM 1885 TO 1889.

BY

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PREFACE

The act of June 12, 1878, which provided in substance for the official publication of only such decisions of the Supreme Court as should be marked by the judge who wrote the opinion, to be reported, excluded from the series of State Reports many decisions. Some of these, rendered between 1881 and 1884, were offered to the profession by Pennypacker's Reports. Later, Walker's Reports appeared, containing some decisions of the period covered by Pennypacker's Reports, and others rendered, with two exceptions, before October, 1885. At this time the issue of the Central Reporter and the Atlantic Reporter was begun, publishing every current decision. Concurrently many cases were reported in the Weekly Notes of Cases. The thirteen volumes of the former ended with the summer of 1888; the first seventeen of the Atlantic, and the Weekly Notes of Cases, cover the period to March 28, 1889. From this date, under a new statute, the official reports contain every decision of the Supreme Court. Monaghan's Reports publish practically all the officially unreported decisions of that court, which were rendered from October, 1888, to March, 1889.

Considerably more than fifteen hundred decisions of the Supreme Court are to be found in the Central and Atlantic Reporters and Weekly Notes of Cases, which do not appear elsewhere. These are spread through thirty-five volumes, intermingled with the decisions of other states, and for that reason are inconvenient of access, and costly. It has seemed to the reporter that a service would be rendered to the profession by the collection of these cases into volumes of a reasonable size, obtainable at a moderate expense. This series of Reports contains all the unofficially reported decisions rendered during the period from October, 1885, to March, 1889, except such as are found in Monaghan's Reports. These have been omitted in order to prevent unnecessary duplication, the reports mentioned being in the hands of a considerable percentage of the profession.

The Table of Cases in the accompanying Digest of this series of Reports shows the volume and page of the Central and Atlantic Reporters and the Weekly Notes of Cases in which these have been reported. Any case cited in any digest or elsewhere by reference to the Central and Atlantic, or to the Weekly Notes of Cases, during the period covered, can be found by aid of this table.

In a footnote to each reported case a list of citations is given, showing where the decision has been subsequently referred to by any court in Pennsylvania.

A feature which, it is believed, will add much to the utility of these Reports, is the notes, indicating other cases in which the same or cognate principles may be found, or which suggest judicial or statutory qualifications and modifications.

For ease of reference each volume contains an index both to the cases and the notes therein; and a general index or digest of all the volumes accompanies the series.

S. B. SADLER.

CARLISLE, PA., 1904.

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TABLE

OF

CASES REPORTED IN THIS VOLUME.

CASES CITED

IN THE

OPINIONS OF THE SUPREME COURT.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

Andie Kerr, Jr., Appt., *v.* John P. Wonderlich et al., Exrs. of William D. Wonderlich, Deceased, for Use of Charles Berg.

A judgment entered by confession after appearance in an amicable action of debt is not within the letter or the spirit of the act of April 4, 1877, providing for the opening of judgments "entered by virtue of a warrant of attorney, or on a judgment note."

The refusal to open such a judgment is an act of judicial discretion which the supreme court will not review.

(Argued May 6, 1887. Decided May 23, 1887.)

January Term, 1887, No. 365, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decision of the Common Pleas of Cumberland County discharging a rule to show cause why a judgment should not be opened and the defendant let into a defense to the amount of $2,000 against said judgment. Appeal quashed.

This was a judgment entered in an amicable action of debt November 2, 1881, by W. D. Wonderlich, against Andie Kerr, Jr., upon the following instrument in writing:

W. D. Wonderlich
v.
Andie Kerr, Jr.

In the Court of Common Pleas of Cumberland County.

No. —, November Term, 1881.

Real debt, $3,864. Interest from April 1, 1882, at five per cent per annum.

Amicable action of debt and confession of judgment given by the defendant to secure to the plaintiff the payment of a balance of purchase money on a farm conveyed by plaintiff to defendant. Deed delivered the same date herewith. Farm in Middlesex township, containing 117 acres and 144 perches.

I, Andie Kerr, Jr., the defendant in the above-stated amicable action of debt, hereby appear to the same, and, waiving all writs, confess judgment to W. D. Wonderlich, the plaintiff in the same, for the sum of three thousand eight hundred and sixty-four dollars, with interest at five per cent, costs of suit, release of all errors and stay of execution, until April 1, 1887, on the principal sum, the interest to be paid annually on April 1 of each year.

Witness my hand and seal this 2d day of November, A. D. 1881.

Andie Kerr. [Seal.]

Witness: F. E. Beltzhoover.

This rule was granted on the defendant's petition, March 18, 1885.

The petition of Andie Kerr represents that on September 20, 1881, he purchased a farm from W. D. Wonderlich for the consideration of $18,864, and that on October 15, following, the same was conveyed to him by the vendor by deed of general warranty, and that he gave his judgment for $3,864 which was entered in the court of common pleas, to No. 190 of November 7, 1881; that subsequently to taking said conveyance he learned that, although the line dividing his land from that of Jonas Albright is the center of the Letort spring, yet the line fence separating the farms was wholly on the north side of land of said spring and upon the land conveyed to him by said Wonderlich; that said Albright has the right to come upon the said north side of the spring, on his land, to repair his portion of the said line fence; and this provision about the location and repair of said fence was reserved in the deed from Albright to Wonderlich for a parcel of the land conveyed by the latter to Kerr. The

petitioner avers that he suffers damage thereby, especially as it cuts off access from his farm to the spring; that there is a lane running across the farm from north to south, a distance of about 100 perches, which said vendor stated positively to him was for the sole use of the petitioner, and could be closed or otherwise as he, the petitioner, saw proper; that since the taking of the said farm he has tried several times to close said lane, so as to prevent the using and miscellaneous passage of wagons, carts, stock, etc., but finds that he cannot close it against Jacob Albright, who has certain rights therein which are encumbrances upon the land bought by him; that he is damaged to the extent of at least $1,000 by each of these encumbrances, and he desires that these amounts may be set off against and credited upon said purchase-money judgment, and that to this end the said judgment be opened and he let into a defense.

Answer was made by the respondents, that W. D. Wonderlich was dead (they are his executors), that the judgment had been transferred to Charles Berg on January 29, 1884, and that they believe that the allegations complained of as to misrepresentation and concealment are unfounded in fact; that petitioner was fully acquainted with the facts in regard to said lane and fence; that no damage was done to him, and that the transfer to Charles Berg, aforesaid, was without guaranty as to payment.

The opinion in the court below by SADLER, P. J., on discharging the rule after referring to the evidence proceeded as follows:

Both of the encumbrances complained of by the petitioner are such as affect only the physical condition of the property. They are visible to the eye, and a different rule prevails as to them from that which controls when encumbrances are of the kind that affect the title. Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542.

The line fence between the land of Wonderlich and Albright was observable to Kerr at the time of the sale. He saw it when the land was surveyed and took the farm, therefore, with a full knowledge of this encumbrance of which he now complains. When he found that the whole of the line fence was on the north side of the spring, it became evident that Albright's portion could not be repaired without he (Albright) could take materials there for that purpose. No testimony has been submitted which

shows that misrepresentation was made to him in reference to this matter.

The matter insisted upon with more earnestness is with reference to the lane. It was also open to view, and "it is to be presumed that the grantee bought with notice of it; that it was in contemplation of the parties, and that the price was fixed with reference thereto."

This would be undoubtedly so and would be controlled by the decision rendered in Patterson v. Arthurs, 9 Watts, 152, unless a deceit was practised upon Kerr which induced him to pay a larger price for the property than he would have otherwise done.

In order to support an action for deceit for false and fraudulent representations, the plaintiff must show that the representations were untrue; were known to the defendant to be untrue; were calculated to induce him to act; and did induce him to act accordingly. Cox v. Highley, 100 Pa. 249.

It must be affirmatively shown that the fraudulent representations came to the plaintiff's knowledge, and induced him to give the credit which resulted in the loss. One fact cannot be presumed from another which is itself but an inference. McAleer v. McMurray, 58 Pa. 126.

Fraud and falsehood on one side and damage on the other must concur to sustain the action. Addington v. Allen, 11 Wend. 404.

Again; Wonderlich is dead. The judgment was entered more than five years ago. Although Kerr had a difficulty with Albright about the lane in the spring of 1883, he sought no relief until March 18, 1884. In the meantime the judgment had passed into the hands of another for a valuable consideration and without any guaranty. It is also to be observed that none of the witnesses testify that Kerr suffers any damage by Albright's right to pass over the lane.

We are of the opinion on the whole case that Kerr is not entitled to the relief prayed for.

And now, to wit, November 4, 1886, the rule is discharged at the costs of the petitioner.

The assignments of error specified the action of the court: (1) In discharging the rule; (2) in refusing to open the judgment; and (3) in making the above order (quoting it).

F. E. Beltzhoover and *M. C. Herman,* for appellant.—The detention of purchase money, on account of breaches of the vendor's covenant, is a mode of defense peculiar to Pennsylvania jurisprudence; and the principle is well settled that when a vendor has conveyed land with covenants on which he would be liable to the vendee in damages for defect of title, the vendee may detain purchase money to the extent to which he would be entitled to recover damages upon the covenant. The covenant of warranty binds the grantor to defend the possession against every claimant of it by right, and is consequently a covenant against rightful evictions; and a private right of way, of the existence of which a purchaser has no actual notice, but only that constructive notice with which an unsearched registry affects him, is an encumbrance within the covenant, and after it has led to eviction is necessarily a breach of the covenant of warranty—for a covenant of warranty, after eviction, stands on the same ground as those other covenants which are broken as soon as made; and the covenantee having the right to claim damages for the breach, his appropriate place to have them assessed is in the suit for purchase money. Wilson v. Cochran, 46 Pa. 229.

Here was a lane running over the farm sold to Kerr from the turnpike, its northern boundary, to the Letort spring, its southern boundary.

The testimony on the subject shows as plainly as anything can that Wonderlich announced publicly and positively to the assembled bidders at the sale that the lane was for the exclusive use of the farm, and that none of the neighbors or adjoining owners had any right of way over it. To Kerr and others, after receiving this assurance, it was the same as if no lane was visible on the ground. The fact of its existence was qualified by the vendor so as to make it appear as the sole and exclusive property of the farm, without any right at all in anyone else respecting it.

But, says the learned court below, the petition of Kerr for relief "represents that he was misinformed by the vendor as to the lane; but he does not aver that he was influenced thereby to purchase the land. Without such being the case his prayer should not be granted." It is respectfully submitted that it was unnecessary for the petitioner to so aver. The ground for relief set forth in the petition is a breach of the warranty. The false information given by the vendor so qualified the appearances

on the land as to utterly efface all evidence of the existence of any right of way as belonging to any other than the owner of the farm. Kerr therefore had not only no actual notice of Jonas Albright's right of way, but was assured by the vendor that no such right existed. It was therefore an encumbrance within the covenant. Wilson v. Cochran, 46 Pa. 229; Peck v. Jones, 70 Pa. 83; Roland v. Miller, 3 Watts & S. 390.

Then the right reserved by Jacob Albright to set and maintain his part of the line fence on Kerr's side of the spring is another serious encumbrance upon the land, which was not made known to Kerr at the time he purchased and was unknown to him at the time he accepted the conveyance. Wonderlich had been requested by Kerr to point out the boundary lines; and he did so, accurately at this point, the line running along the center of the spring; but the fact that Albright had the right to maintain his fence on Kerr's side of the spring was not disclosed by Wonderlich. True, the reservation was written in the deed of Albright to John Wonderlich; and this appeared in the muniments of the title. Yet it was in fact unknown to Kerr. No reference to it appears in the deed to him.

This we contend is also within the covenant of warranty, and the vendee is entitled to have deducted from the purchase money his damages for the breach. Kerr was overreached by being led by Wonderlich to believe that the vendee of the land would be entitled to occupy the premises up to the center of this spring; and so believing he accepted the conveyance. This was a misapprehension of a material fact, induced by the misrepresentations of the vendor; it was a fraud upon the vendee, of which he may take advantage as a defense to the payment of the purchase money. Stubbs v. King, 14 Serg. & R. 206.

Hepburn, Jr., & Stuart, for appellees.—This appeal should be quashed; because it is an appeal from the discretion of the court below and is not authorized by any statute.

The judgment is not one which has been entered by virtue of a warrant of attorney, or on a judgment note; therefore, it is not within the act of April 4, 1877 (Purdon's Digest, 704, § 12), and the refusal of the court cannot be reviewed.

The law as it was prior to April 4, 1877, is still in force as to this judgment.

The opening of a judgment is a matter of discretion, and

generally cannot be reviewed on a writ of error, unless when the opening of a judgment, in the particular case, is in excess of power. The refusal to open a judgment is simply to do nothing, to stand still, and is not a transgression of power. Henry v. Brothers, 48 Pa. 70; McClelland v. Pomeroy, 75 Pa. 412.

An amicable action in debt, with appearance by defendant and confession of judgment, is not analogous to a warrant of attorney, or within the spirit of the act of 1877.

Warrants appear often on covenants and agreements, as penalty for default, or security for performance. Very often, they are signed ignorantly, or without a proper understanding by the parties to be bound; and are entered without notice to defendants.

An amicable action necessarily imports a debt fixed and clearly defined, for which the plaintiff has a right to demand, and insist upon having, security — as, in this case, the remainder of purchase money due. It is as conclusive as a judgment obtained adversely, and stands on the same footing. The very form of it is notice that it will be entered; for it is of no use unless entered.

A judgment entered on a warrant of attorney is not within the provisions of the act of June 16, 1836, allowing stay of execution on judgments in amicable actions. Slone v. King, 35 Pa. 270.

The act of 1877 did not mean to give a right of appeal in every case where judgment was entered by consent of the defendant, or of the parties, nor in every case where the defendant appears and confesses judgment.

This act authorizes an appeal only in case the judgment has been entered by virtue of a warrant of attorney, or by virtue of a note in which judgment is confessed, under § 28 of the act of February 24, 1806. In either case the judgment is entered without notice to the defendant, and without his having an opportunity to be heard. Lamb's Appeal, 89 Pa. 409.

The petition of Kerr, the defendant in the judgment, does not disclose any encumbrance affecting the title to the land.

It does not aver any fraud on the part of Wonderlich, which induced the defendant to purchase.

There is no evidence of encumbrance and eviction, and none of fraud or deceit.

It is plain that the petition was drawn under the belief that

the covenant of general warranty covered visible easements on the ground. The mere existence of the easements was relied upon to justify a retention of purchase money. Wilson v. Cochran, 46 Pa. 229, does not support the position for which it is cited, and, besides, it was the opinion of this court, delivered in 1862, before all the facts of the case were known, and in which certain principles of law were declared which seemed to have been ignored by the court below; but when the case came back in 1864 it was distinctly stated (48 Pa. 112, 86 Am. Dec. 574), that "if Wilson bought with Shultz's road open before his eyes, and the necessary inference is that he intended to buy subject to the easement, the mere enjoyment of the road by Shultz is not and cannot be eviction of Wilson."

In Memmert v. McKeen, 112 Pa. 315, 4 Atl. 542, the difference between the two kinds of encumbrances is clearly stated by Justice PAXSON; and of this kind he says: "Where there is a servitude imposed upon the land which is visible to the eye, and which affects, not the title, but the physical condition of the property, a different rule prevails. Thus it was held in Patterson v. Arthurs, 9 Watts, 152, that where the owner had covenanted to convey certain lots free of all encumbrances, a public road, which occupied a portion of such lots, was not an encumbrance within the meaning of the covenant. This is not because of any right acquired by the public, but by reason of the fact that the road, although admittedly an encumbrance, and possibly an injury to the property, was there when the purchaser bought, and he is presumed to have had knowledge of it. In such and similar cases there is the further presumption that if the encumbrance is really an injury, such injury was in the contemplation of the parties, and that the price was regulated accordingly."

It is admitted that the lane and fence were visible; and they plainly indicated the uses for which they were intended.

Therefore there was no encumbrance, nor eviction to support an action on the warranty in the deed; and, on that ground, Kerr could not defalk the unpaid purchase money.

There is but one other ground on which a court of equity would interfere, or on which a court would open the judgment, that is: on the ground of deceit.

A court would not interfere, on this ground, to open a judgment, unless the defendant should show satisfactory evidence

of fraud, or deception by the plaintiff, which induced the making of the contract, or giving of the judgment. Snell, Eq. 383, 385, 386.

The evidence offered by defendant was very meager at best. It was weighed and passed upon by the court below; and its refusal to open the judgment was in the exercise of a sound discretion, which this court will not review, even under the act of April 4, 1877. Earley's Appeal, 90 Pa. 321; Hickernell's Appeal, 90 Pa. 328; Wernet's Appeal, 91 Pa. 319.

PER CURIAM:

The judgment sought to be opened in this case is not within the letter or spirit of the act of April 4, 1877. Lamb's Appeal, 89 Pa. 407.

The record shows the entry of an amicable action, and the appearance of the defendant in the said amicable action, and the confession of judgment in favor of the plaintiff for a sum specified. The refusal to open such a judgment is an act of judicial discretion which we will not review. McClelland v. Pomeroy, 75 Pa. 412.

Appeal quashed.

John C. Haddock, Doing Business as The Plymouth Coal Company, Plff. in Err., *v.* Frank Rotkofski.

Although by a custom of a mining region a miner's laborers have their time "turned in" to his employer and are then paid by the employer out of the miner's wages, yet, without proof that a laborer's time has been so "turned in" or that the employer had notice of the laborer's services, the laborer cannot maintain against the employer an action for his wages after the miner has been paid by the employer in full.

(Argued April 13, 1887. Decided May 23, 1887.)

January Term, 1887, No. 312, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error

NOTE.—The decision in the case is based on Plymouth Coal Co. v. Kommiskey, 116 Pa. 365, 9 Atl. 646, where the same custom was considered. This is followed in Fairfield v. Wyoming Valley Coal Co. 142 Pa. 397, 21 Atl. 874, in which case it was said that the rights of the laborer can rise no higher than those of the miner, and no suit can be maintained until the wages are due to the latter.

to the Common Pleas of Luzerne County to review a judgment on a verdict for the plaintiff in an action of assumpsit. Reversed.

The facts as they appeared at the trial before WOODWARD, J., are stated in the opinion.

The plaintiff having testified to the circumstances under which the services for which he claimed compensation were rendered, and that for a previous month's work he had received his pay from the defendant's clerk, was asked on cross-examination:

Q. Who employed you at the mines?

A. The miner, Ed. McCormick.

Q. Where was he when he employed you?

A. He used to be working in another place; that man went to him and coaxed him back.

Q. Ed. McCormick went to you?

A. Yes, sir, and coaxed me to take me away.

Q. What did McCormick say to you?

Objection.

By the Court: As I understand it that is not cross-examination.

Exception. First assignment of error.

The defendant proposed to ask, on cross-examination, the question of John B. Davis, the plaintiff's witness on the stand, "How was the work being done in this air way in which plaintiff was employed," for the purpose of showing the custom with reference to the payment of the laborer therein.

Objection: That this is an attempt to introduce upon cross-examination matter of defense.

By the Court: "The examination in chief having brought out the fact of a custom existing in the mine as between the miner and the laborer, you may cross-examine in such a way as to show that the relation of these particular parties was not that of miner and laborer; that would be cross-examination. If it goes beyond that, it would certainly not be cross-examination on the same subject-matter."

Exception. Second assignment of error.

The defendant proposed on cross-examination to ask the same witness on the stand:

Q. You say McCormick did this by contract?
A. Yes, sir.
Q. How much did he get for driving?
A. Two dollars per yard—lineal yard.
Q. What did he have to find?
Objection.
A. Everything that he wanted.
By the Court: I do not see how that has any bearing on this question, unless the laborer had notice of it in some way.
The question is asked for the purpose of enlightening the court as to the contract between the plaintiff and McCormick.
Q. What did McCormick have to find under his contract?

Objection. Not cross-examination.
Objection sustained. Exception. Third assignment of error.
The defendant also proposed to ask Edward McCormick, a witness on the stand for the defendant, whether or not the plaintiff, Frank Rotkofski, had not sued him for the claim that he was now suing the defendant for. Objection. Objection sustained. Exception. Fourth assignment of error.

The court charged the jury, *inter alia,* as follows:
We say to you in regard to these questions that where a universal custom exists with regard to the carrying on of any business, that custom as a general thing becomes the law of that business, in the absence of any law to the contrary. Now the universal custom in this mining country is that the miner blasts or loosens the coal, and the laborer loads it into the cars, but the laborer is uniformly employed by the miner. The custom also is for the miner to keep the time of the laborer and turn it in to the employer, and upon that return the payment is generally made.
It appears in the present case that for the month of July, 1884, this plaintiff was employed by McCormick, the miner; that he went to work as a laborer under him in these mines; that McCormick recognized the relation existing between them as that of miner and laborer, and in view of that relation kept the time of the laborer and turned it in to the company in the usual way.

It further appears that for the month of August and a portion of September this plaintiff continued to work for McCormick, without any knowledge or notice, so far as the evidence shows, that there had been any change in the relations between McCormick and the company from that which had previously existed in the month of July.

We say to you as a matter of law that under these circumstances the plaintiff had the right to assume and believe, and to act upon that assumption and belief, that the same relation continued to exist between this company for the month of July as binding upon them, and that under all the circumstances presented in this case the plaintiff was entitled to have notice from the company that he must look to McCormick for his pay and not to it; and there being no evidence in this case of any such notice, we say to you that the universal custom in this mining country ought to be applied by you to this case. Fifth assignment of error.

The defendant submitted, *inter alia,* the following points:

2. The only evidence in the case upon the question of the turning in of the time of the plaintiff is that of Edward McCormick, the miner, that he did not turn in the time. There can be no implied contract based upon the custom alleged of charging the operator for the wages of the laborer of the plaintiff.

Ans. That point we decline to affirm. Sixth assignment of error.

3. From the uncontradictory evidence in the cause there was no contract of hiring between the plaintiff and defendant, and the verdict of the jury must be for the defendant.

Ans. That point we decline to affirm. Seventh assignment of error.

4. The custom existing between the laborer and the operator, as to the payment of wages, would not apply to the facts of this case, this being a case between an air-way contractor and a laborer.

Ans. We cannot affirm that point as we understand the law, and it is disaffirmed. Eighth assignment of error.

Verdict and judgment were for the plaintiff, for $48.86.

George W. Shonk and *G. L. Halsey,* for plaintiff in error.—The question, "What did McCormick say to you?" was certainly

part of the subject-matter of the examination in chief. Mitchell v. Welch, 17 Pa. 339, 55 Am. Dec. 557.

The purpose of our offer which is the subject of the second assignment of error was to show by the witness on the stand that the work which we contracted with McCormick to do was different from that required of contracting miners for the mining of coal.

This we conceived to be proper cross-examination, because the witness had been asked in chief as to the labor performed by the defendant in error in the mine. If we had gotten this testimony, we would have shown that this laborer received from his employer, McCormick, a greater compensation than the coal miner pure and simple gives to his laborer, and therefore that the relation between McCormick and Rotkofski was different from that which existed between the coal miner and laborer in the mine.

The question what McCormick was to find under his contract was cross-examination, because the plaintiff asked Mr. Davis in his examination in chief about McCormick's employment by the Plymouth Coal Company.

It had this bearing: if we owe Rotkofski anything it is because McCormick hired him. Now the witness was asked in chief if McCormick worked for the Plymouth Coal Company. He said he did. This inquiry was competent, to show that he did not occupy any relation to us that justified his employing anyone for us. We should have been allowed an answer to the question, to completely explain McCormick's relation to us.

We were entitled to ask McCormick when he was on the stand whether or not Rotkofski had not sued him for the claim, for the purpose of showing that Rotkofski had made a demand upon McCormick for his wages and recognized him as his employer.

A custom, before it can bind anyone, must be proved by evidence, clear, uncontradictory and distinct. Adams v. Pittsburg Ins. Co. 76 Pa. 414.

Rotkofski was employed in this mine about three months. There is no evidence as to how well known this custom had become. There is no testimony in this case showing what the effect was of turning the time into the office,—what was done there in pursuance of such action.

The court said to the jury that it was the universal custom in this mining region.

There was no testimony adduced as to the universal custom in this mining region.

The jury were also told that, the custom having been established, before the plaintiff in error could be relieved from his obligations under it he must have brought knowledge home to the laborer that he was no longer to be bound by it.

We, therefore, contend that there was no such custom here as makes us answerable in this behalf to the said defendant in error. Potts v. Aechternacht, 93 Pa. 141; Jones v. Wagner, 66 Pa. 433, 5 Am. Rep. 385.

W. H. McCartney, for defendant in error.—The principal contention on the part of the plaintiff in error is as to the law of custom which affects this case. It is claimed that there was not sufficient evidence of custom to bind the defendant below. The answer to this is that Haddock knew of the custom and acted on it, for he paid Rotkofski for the month of July.

OPINION BY MR. JUSTICE CLARK:

In September, 1884, John C. Haddock, who was operating an anthracite coal mine in Luzerne county, contracted with Edward McCormick to drive an air way of certain dimensions in the mine; McCormick to receive $2 per lineal yard. Rotkofski was hired by McCormick to assist in the work, and was to receive for his labor at the rate of $2.10 per shift. He does not pretend to have been in the immediate service of Haddock, but of the contractor, McCormick, and therefore no promise on the part of Haddock can arise by implication.

It is contended, however, that there was a custom or usage in the operation of this mine, for the contractor to "turn in" the time of his laborers, and that Haddock thereupon paid the laborer's claims, charging the contractor's account; and, upon this general usage or mode of conducting the business, the plaintiff claimed to recover.

The difficulty in this case, however, is that there is not the slightest evidence that Rotkofski's time, for which he claims, was turned in to Haddock, or that Haddock even knew that the services had been rendered. McCormick, it appears, received full pay, according to his contract, drew out the entire balance due him, including the amount which he should have turned in for Rotkofski.

The case is in all respects similar to, and is ruled by, Plymouth Coal Co. v. Kommiskey, 116 Pa. 365, 9 Atl. 646, and upon the authority of that case the —

Judgment is reversed and a *venire facias de novo* awarded.

Ezra P. Titzell, Plff. in Err., *v.* Thomas P. Cochran.

A devise to T., without words of limitation, "and if he should die leaving no lawful heirs the whole to descend to his brothers and sisters share and share alike or to their legal representatives," vests a fee tail in T.

A tenant in tail who in due form executes, acknowledges and, on motion in open court, records, under the act of January 16, 1799, a deed to bar the entail, may by reconveyance from his grantee acquire the land in fee simple.

(Argued May 11, 1887. Decided May 23, 1887.)

July Term, 1887, No. 39, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Perry County to review a judgment for the plaintiff in a case stated. Affirmed.

The following facts were agreed upon by the parties, in the nature of a special verdict, as if found by the jury, for the opinion of the court.

Thomas Cochran, who was the father of the plaintiff, Thomas P. Cochran, being the owner in fee simple of the land hereinafter mentioned and described, on the 2d day of May, 1838, made his last will and testament, which after testator's death was duly probated February 19, 1846. *Inter alia,* said will de-

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NOTE.—This decision was based upon the fourth item of the will. In a subsequent proceeding it was insisted that if the whole be taken together, the result should be different. The supreme court, however, reaffirmed its ruling. Cochran v. Cochran, 127 Pa. 486, 17 Atl. 981. That the entail may be so barred is also recognized in Ralston v. Truesdell, 178 Pa. 429, 35 Atl. 813, and Linn v. Alexander, 59 Pa. 43. Had the testator died subsequent to the passage of the act of April 27, 1855 (P. L. 368), the estate in fee tail created by the will would have been taken and construed as an estate in fee simple, but the act was not retroactive in its effect. Karchner v. Hoy, 151 Pa. 383, 25 Atl. 20. It does apply, however, to a will executed before, where the testator died subsequently. Price v. Taylor, 28 Pa. 95, 70 Am. Dec. 105.

vised real estate to said Thomas P. Cochran as follows, *in hæc verba:*

"Fourthly: I do give, bequeath, and devise to my son Thomas Preston Cochran my farm in Pfoutz's valley, with all its buildings and improvements, containing 152 acres, more or less, also the hill tract bought at sheriff's sale, as the property of Daniel Huffman, deces'd, containing about 200 acres more or less, with all the improvements thereon: also my dwelling house in Millerstown at the death of his mother, it being on the east side of the Main street, & the four lots attached to the same on the east side of the Main street, in said Millerstown, Perry county; and if he should die, leaving no lawful heirs, the whole to descend to his brothers & sisters, share & share alike, or to their legal representatives."

On the 22d day of March, 1887, the above devisee and plaintiff, Thomas Preston Cochran, executed the following deed together with his wife, Hannah M. Cochran, to Ezra P. Titzell,—to wit:

This indenture, Made March 22, A. D. 1887, between Thomas P. Cochran and Hannah M. Cochran, his wife, of the borough of Millerstown, Perry County, Penna., of the first part: and Ezra P. Titzell of the same place of the second part:

"*Whereas,* The tract of land hereinafter described, and hereby conveyed, was duly devised to the said Thomas P. Cochran, by the last will and testament of his late father, Thomas Cochran of Millerstown, aforesaid, which was duly probated on the 19th day of February, 1846 (see Will Book 'B,' page 204) in such manner as to create an estate tail by implication, instead of a fee simple: *Now then this Indenture Witnesseth,* That the said Thomas P. Cochran and Hannah M., his wife, for and in consideration of the sum of $10 as hereinafter set forth as duly paid to them, by the party of the second part, and for the purpose of barring, debarring, and destroying, and with the intention hereby to bar, debar, and destroy all estates tail, possession, remainder or reversion that the said Thomas P. Cochran, or his heirs, or the heirs of his body, in his or their right, have or are entitled to have, now or hereafter, or any right which the brothers and sisters of the said Thomas P. Cochran, or their legal representatives have, or may be entitled to have, as remainder-men under the will of the said Thomas Cochran, dec'd,

to, and in, all and singular, the lands and tenements, real estate and premises, hereinafter described and conveyed and mentioned; and in pursuance, and by virtue of an Act of Assembly of said State of Pennsylvania, in such case made and provided, entitled 'An Act to Facilitate the Barring of Entails,' have and do hereby grant as follows, to wit: *Now this Indenture Witnesseth,* That the said Thomas P. Cochran and Hannah M. Cochran, his wife, for the purpose of barring and cutting off the issue in tail of the said Thomas P. Cochran and the remainders and reversions, as before expressed in this Indenture at length, and for and in consideration of the sum of $10, lawful money, etc., to them well and truly paid by the said Ezra P. Titzell, etc., the receipt whereof is hereby acknowledged, have granted, bargained, sold, aliened, released, and confirmed, and by these presents do grant, bargain, sell, alien, release, and confirm unto the said Ezra P. Titzell, his heirs and assigns in fee simple, the following tract of land, to wit: a tract of land situated in Greenwood Township, Perry County, Pennsylvania, bounded and described as follows, to wit: Beginning at —— —— on line of land formerly owned by J. Gallaher, and now belonging to the Adams Estate: S. 24, E. 55 p. to a black oak; thence by said Adams Estate lands S. 42, E. 63 p. to a post on Cockalamus Creek; thence by other lands of grantor up said creek 240 perches to an elm; thence by other lands of grantor (formerly John Gallaher's) N. 25, W. 116 perches to a pine; thence by lands of Reading Iron Co., and lands of Robert P. Cochran, S. 56½, W. 248 perches to the place of beginning, containing 152 acres, more or less, being part of same lands surveyed 15 April, 1767, in pursuance of an order No. 828, dated 9th August, 1766, for 200 acres, etc., and being part of the same lands devised to the said Thomas P. Cochran, by the will of his father, Thomas Cochran, before referred to.

"Together with all and singular the improvements, ways, waters, water courses, rights, liberties, privileges, hereditaments, and appurtenances whatsoever thereunto belonging, or in any wise appertaining, and the reversions, rents, issues and profits thereof; and also all the estate, right, title, interest, use, trust, property, possession, claim, and demand whatsoever of them, the said Thomas P. Cochran and Hannah M. Cochran, in law, equity or otherwise, of, in, to, or out of the same:

"To have and to hold the said described 152 acres of land,

hereditaments and premises hereby granted or released, or mentioned, and intended so to be, with the appurtenances unto the said Ezra P. Titzell, his heirs, to and for the only proper use and behoof of the said Ezra P. Titzell, his heirs and assigns forever.

(Then follows a special warranty by grantor to grantee.)

"*In witness whereof,* The said Thomas P. Cochran and Hannah M. his wife hereunto set their hands and seals, the day and year first above written.

Sealed and delivered in the presence of A. Fred Keim.	Thos. P. Cochran. [Seal.] H. M. Cochran. [Seal.]

Then follows the receipt for the purchase money, and the usual acknowledgment by grantors, for husband and wife with separate examination of the wife, etc., taken before A. Fred Keim, a justice of the peace in and for Perry county, Pennsylvania, on March 22, 1887.

On March 25, 1887, a motion was made in the open court of common pleas of Perry county, Pennsylvania, by B. F. Junkin, an attorney of said court; and on the same day the following entry made on the appearance docket of said court (Book "H," vol. 2, p. 140) and also the same entry and record was made on sheriff's deed docket "C," page 93, of said court,—to wit:

In Re the matter of barring the entail in Thomas P. Cochran, in certain real estate situated in Greenwood Township, Perry County, Pennsylvania.	In the Court of Common Pleas of Perry County.
Thomas P. Cochran and Hannah M. Cochran his wife, to Ezra P. Titzell.	Deed to bar entail.

"*And now, to wit,* 25th day of March, A. D. 1887, B. F. Junkin, Esq., an attorney of this court, produces in open court a deed indented, bearing date the 22d day of March, 1887, between Thomas P. Cochran and Hannah M. Cochran his wife, of the first part, and Ezra P. Titzell, all of the County of Perry, of the second part, for conveying unto the said Ezra P. Titzell,

his heirs and assigns of the second part, as well in consideration of the sum of $10 as for the purpose of barring and destroying all estates tail of the said Thomas P. Cochran and Hannah M. his wife, and all remainders and reversions, which the brothers and sisters or their representatives have or may be entitled to have, under the last will and testament of Thomas Cochran, deceased, by whom the lands hereinafter mentioned were devised to the said Thomas P. Cochran, in the premises, to wit: all that tract of land situated in Greenwood Township, Perry County, Pennsylvania, Beginning at —— on line of lands formerly Gallaher's and now belonging to the Adams Estate, S. 24, E. 55 perches to black oak; thence still by said Adams Estate lands S. 42, E. 63 perches to post on Cockalamus Creek; thence by other lands of grantor up said creek, 240 perches to an elm; thence by other lands of grantor, and formerly John Gallaher's, N. 25, W. 116 perches to a pine; thence by lands of Reading Iron Co., and Robert P. Cochran, S. 56½, W. 248 perches to place of beginning, containing 152 acres, more or less, being part of the same lands surveyed April 15, 1767, in pursuance of an order No. 828, dated August 9, 1766, for 200 acres, and part of the same lands devised to the said Thomas P. Cochran, by the will of his father, Thomas Cochran, before referred to, was subject, etc., by which indenture it is fully declared to be the intention of the said grantors to bar, defeat, and destroy all estates tail of Thomas P. Cochran and Hannah M. his wife in the aforesaid premises."

And on motion of B. F. Junkin, an attorney of said court, the same was ordered by the court to be entered among the records thereof, in the manner commonly used with respect to sheriff's deeds, according to the provisions of the act of assembly relating thereto, entitled "An Act to Facilitate the Barring of Entails;" which is accordingly done.

By the Court:

The foregoing deed by Thomas P. Cochran and wife to said Ezra P. Titzell, dated March 22, 1887, was duly recorded in the office for recording of deeds, in and for the said county of Perry, Pennsylvania, on the 25th day of March, 1887, in Book "U," No. 2, page 401.

After the said Thomas P. Cochran and wife had executed, acknowledged, and delivered the said deed on the 22d day of

March, 1887, to the said Ezra P. Titzell, the said Titzell and Jane G. Titzell, his wife, did on the said 22d day of March, 1887, reconvey the said tract of land back to the said Thomas P. Cochran in fee simple, by a deed duly executed, acknowledged, and delivered, with the proper acknowledgments for barring the dower of the said Jane G. Titzell, wife of the said Ezra P. Titzell, which last deed was also duly recorded in the said recorder's office of said county, on the 25th of March, 1887, in Book "U," No. 2, page 403.

On the 7th day of April, 1887, the said Thomas P. Cochran by articles of agreement in writing sold the real estate mentioned in the foregoing deeds to Ezra P. Titzell; and the said Titzell declines to accept the conveyance of said Cochran and wife, because he does not know that the said Cochran can, by their conveyance, make to him a complete and out and out title, for the said lands in fee simple, which the said Cochran, by his agreement of sale is bound to do.

The questions for the court are:

First: Did Thomas P. Cochran, under the devise in his father's will (before recited), take an estate in fee simple in the 152-acre tract, in said will mentioned, because that is the tract which the said Thomas P. Cochran has sold to the said Ezra P. Titzell?

Second: If the title is not a fee simple by the terms of the devise aforesaid, is it a fee tail by implication? And if a fee tail, is it well barred by the proceedings recited in this case stated, so as to cut off the devise over to the brothers and sisters, or their legal representatives; whether it be a remainder, or executory devise, and whether the latter is void for remoteness or not?

If the court is of the opinion that Thomas P. Cochran and wife can, by their conveyance in due form, give a fee simple to the said Titzell for the said 152 acres of land, then it will enter judgment for the plaintiff against defendant for $1 without costs.

If the court is of opinion that said Cochran cannot convey to said Titzell an out and out title in fee simple for the said 152 acres of land, then it will enter a general judgment for the defendant, with costs of suit.

And it is agreed that either party to this case stated may sue

out a writ of error to the judgment of the court, to the supreme court of Pennsylvania, without oath or bail.

Upon entering judgment for the plaintiff in the court below, BARNETT, P. J., filed the following opinion:

Under the act of April 8, 1833, words of inheritance are not required in a devise in order to pass more than a life estate; and it is plain that this testator does not create merely a life estate in his son Thomas, because he provides for the case of the latter's dying without leaving lawful heirs; but he makes no provision in case he should leave lawful heirs; such heirs therefore would succeed to an estate of inheritance.

By "lawful heirs" we think the testator meant lineal heirs, or issue; because he excludes the brothers and sisters of the devisee. Thus, he devises to his son Thomas, and, if he should die without leaving issue, then to the brothers and sisters of the devisee or their legal representatives. This we think creates a fee tail in Thomas. Eichelberger v. Barnitz, 9 Watts, 447; Covert v. Robinson, 46 Pa. 274; Kleppner v. Laverty, 70 Pa. 70.

Whether the devise over is a remainder or an executory devise (although of opinion it is the former) it is not necessary to the judgment in this case to decide; because in either case it is barred or cut off by the deed of March 22, 1887. Linn v. Alexander, 59 Pa. 43; Taylor v. Taylor, 63 Pa. 481, 3 Am. Rep. 565.

Therefore, being of opinion that the plaintiff and his wife can convey in fee simple to the defendant, judgment is hereby entered in favor of the plaintiff against the defendant for $1 without costs.

The assignment of error specified the action of the court in entering judgment for the plaintiff on the case stated.

J. E. Junkin and *J. L. Markel,* for plaintiff in error.—We cannot show by authority that the court below erred in entering judgment for plaintiff; and as the purpose of the case stated was to determine the ability of the plaintiff to make a good title in fee simple to the defendant, we are satisfied if the court can affirm the judgment.

B. F. Junkin, for defendant in error.—It is clear that tes-

tator intended to create an estate of inheritance in his son Thomas, because:

He does not limit the estate for the life of the devisee.

He indicates the line of succession to be the heirs of the devisee, a term so indicative of a fee simple that it has to be pared down to the sense of issue to defeat alienation, and preserve the estate for the issue; and this the law does by treating the interest of the devisee as an estate tail, which is the lowest type of an estate of inheritance.

And the line of succession did not exist when the will of the devisor was made, the only way to preserve the inheritance for the issue of the devisee was to create an estate tail, *i. e.*, an estate transmissible by descent.

The general character of the devise, under § 9, act of April 8, 1833 (Brightly's Purdon's Digest, pl. 10, p. 1711), carried a fee, without words of inheritance; and it is only the "devise over" that cuts the estate down to a fee tail.

It is not a base or conditional fee, so that leaving issue at his death would make it a fee simple (as in Eby v. Eby, 5 Pa. 461), but the statute *de donis* converts it into a fee tail. Eby v. Eby is *sui generis*.

As to the devise over to the brothers and sisters or their representatives, this is a remainder, and not an executory devise, because testator, having only created an estate tail in his son Thomas P., still has the fee simple to dispose of, and this by way of remainder; there is no fee to be substituted for a precedent contingent fee, but a surplus or remainder only. And it is contingent as to its ever taking effect, depending on the failure of issue of Thomas P., an event which is dubious and uncertain. Fearne, Contingent Remainders, ed. of 1791, p. 328.

But if an executory devise, it is too remote, and (if the decisions are correct) is barred even as an executory devise by the deed docking the entail.

The court can insure this title because the interest of Thomas P. Cochran is not less than a fee tail, and that has been duly docked.

PER CURIAM:

The learned judge committed no error in entering judgment in favor of the plaintiff below on the case stated.

Judgment affirmed.

Wellington Swab et Ux., Plffs. in Err., *v.* A. S. Miller et Ux.

A judgment for plaintiff in an action of replevin for a piano, brought by a daughter of a decedent against the decedent's widow, based upon a claim that the piano, which had been purchased by the decedent and placed in his house, where it remained until suit brought, had been given to plaintiff by her father in his lifetime, affirmed by a divided court.

(Argued May 6, 1887. Decided May 23, 1887.)

January Term, 1887, No. 317, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Cumberland County to review a judgment on a verdict for plaintiffs in an action of replevin. Affirmed by a divided court.

This action was brought by A. S. Miller and Ella M., his wife, against Wellington Swab and Bella M., his wife, to recover possession of a piano.

The following facts appeared from the trial in the court below:

The piano in question was purchased by Ira L. Long, the father of Ella, in 1877, and was placed in his house on his farm near Shippensburg. His family at the time consisted of his wife, afterwards the wife of the defendant herein, and five children, the oldest of which was Ella M., at that time thirteen years of age. She afterwards married A. S. Miller, plaintiff in this action.

In March, 1881, Mr. Long and his family moved to Shippensburg and took the piano with them; and in July of the same year Long died. In the inventory of his estate the piano was not included, but his administrators were told that it belonged to the children.

The family continued to reside in the same house until February, 1886, when Ella, the oldest daughter, having married and moved away a short time before, issued the writ of replevin in this action. Plaintiffs claimed that the piano was a gift to Ella from her father. Defendants contended that the piano was bought by the father for all the children, to be used by them in common.

The plaintiffs gave evidence tending to prove parts of conversations of Mr. Long in which he alluded to the piano as property of his daughter Ella, calling it Ella's piano, etc. The defendant offered to prove by Bella M. Swab what was said by Mr. Long when the piano was brought into the house, and what was said when it was taken away. This was objected to on the ground that she was a party in interest, and the court answered: "We think she may testify as to what occurred since the death of Mr. Long, but do not think she would be a competent witness as to what occurred before the death."

Defendants, *inter alia,* presented the following points:

1. The presumption of law is that personal property purchased and paid for by a man in his lifetime, and found in the possession of his family, consisting of his wife and minor children, at the time of his death, belongs to his estate; and in order to vest it in his wife, or either of his minor children, it must be shown by clear and satisfactory proof that there was a gift or sale and delivery of it to such wife or child by the husband during his life. Unless the jury are satisfied by such clear and satisfactory proof, under all the evidence in the case, that Mr. Long made a gift of the piano in suit to the plaintiff during his lifetime, the verdict should be for the defendant.

Ans. This point we affirm. By that we mean that the law as stated in this point is correctly stated, and we instruct you as requested.

2. In order to sustain such a gift, the evidence must show clearly and satisfactorily that the husband not only delivered possession of the property to his child, the plaintiff, but he must be shown also to have used such language as not only indicates his intention to part with his possession, but also with his property in the subject of the gift. The whole evidence in this case taken together does not clearly and satisfactorily show any such language and intention; nor does it establish the fact that Mr. Long intended that the piano should be taken away from his home and out of the possession of his family, and that he and they should be deprived of the property in it; but, on the contrary, the evidence does show the ordinary action and language used by a parent toward a child when it is intended to intrust that child with that peculiar kind of ownership given by parents to little children, and which does not imply a parting with possession of the property so intrusted, nor with the right of property; the

plaintiff in this case was only thirteen years old at the time of the alleged gift.

Ans. We decline to affirm this point as presented, but we submit the evidence to the jury for their consideration under the instructions contained in the first point, which we have affirmed, and further instructions of the general charge.

The court charged the jury, *inter alia,* as follows:

The question for this jury to decide is: Was there a gift of this property by the father to the daughter? Because that is the only mode in which the title is alleged to have become vested in the daughter. Was there a gift, and an executed delivery? Was there an intention to give, executed by an actual delivery of the piano by the father to the daughter? No witness has been brought to the stand who can testify to a formal delivery of the piano; no one was present to hear the father say to the daughter: "Here is a piano I have bought for you; there, take it; it is yours," or something equivalent to that.

The jury, however, may infer it from other facts and circumstances. Since there has been no formal delivery proved, the only delivery that can be established is such as the jury may infer from all the evidence in the case.

Verdict and judgment for plaintiffs.

The assignments of error specified the answer to defendants' second point, the portion of the charge set out above, and the action of the court in sustaining plaintiffs' objection to the admission of evidence of Mrs. Swab.

F. E. Beltzhoover and *S. Hepburn, Sr.,* for plaintiffs in error.

E. W. Biddle and *M. C. Herman* for defendants in error.

PER CURIAM:

This judgment is affirmed, by an equally divided court.

H. Croushore et al., Admrs., Plffs. in Err., *v.* F. W. Knox.

A claim for the interest of a debt, the principal of which has been paid, will be barred by the statute of limitations unless admitted or sued for within six years.

In 1866 Painter gave Knox a power of attorney to sell land and agreed to allow him commissions. In 1871, sometime after September 1, Knox accounted to Painter, showing a balance due Painter, and on May 7, 1878, admitted by an account rendered Painter, that he had theretofore received money from another sale, and on May 7, 1878, as he claimed, paid Painter's agent all that was due Painter, but paid no interest. Painter died in 1880, and in assumpsit, begun May 31, 1883, by his administrators against Knox for interest and for commissions which Knox had deducted (alleging that Knox had used the money, while he had it, in speculation for his own profit), Knox relied principally on the statute of limitations. The money received by Knox from sales of lands was received by him more than six years before suit brought. Painter's administrators introduced numerous letters from Knox to Painter in which they claimed that Knox admitted that he was still indebted to Painter. The case was referred to a referee, under the act of February 23, 1870, and he found for Knox. *Held*, that the statute of limitations was a good defense in the absence of satisfactory proof of Knox's admissions.

(Argued May 9, 1887. Decided May 23, 1887.)

July Term, 1886, No. 168, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Potter County to review a judgment for defendant entered on the report of a referee. Affirmed.

This was an action of assumpsit begun May 31, 1883, by H. Croushore, M. L. Painter, and J. B. Blyholder, administrators *c. t. a.* of the estate of Israel Painter, deceased, against F. W. Knox.

By agreement the case was referred to R. Brown, Esq., under the provisions of the act of February 23, 1870, who reported, *inter alia*, as follows:

On March 7, 1866, Israel Painter, the plaintiffs' testator, and Thomas Collins, executed and delivered to F. W. Knox, the defendant, a power of attorney, authorizing him to sell and deliver contracts in writing, and receive the purchase money for

NOTE.—For acknowledgments sufficient to toll the statute, see note to Mayfarth's Appeal, 1 Sad. Rep. 14.

the lands and interests in lands described in the power of attorney. It was also agreed in parol, at the same time, that Knox was to receive (as compensation for selling) 5 per cent on the price, and for collecting also 5 per cent for such moneys as he should collect, and expenses incurred in examining the lands, etc.

Timothy Ives had previously agreed to sell, by contract in writing, to James V. & H. Brown, and had received a part of the consideration therefor, certain lands in which Israel Painter and Thomas Collins had an interest; and Knox was employed by Painter and Collins to go to Williamsport and arrange the matter with the Browns, and secure from them the amounts due and unpaid from them for the interests of Painter and Collins in the Ives contract.

On July 8, 1867, Mr. Knox rendered a statement of land sold for Painter, Collins, Judd, and himself, and the payments made to and for them.

Subsequently, without date, but after September 2, 1871, he rendered another statement of his accounts with Painter and Collins, including his receipts, disbursements, and payments.

About the same time, or soon thereafter, but without date, he rendered an account with Painter, showing the money he had received for Painter, and from whom received, and his payments to, and disbursements for, Painter.

In that statement Knox charges him with the sum of..		$15,691 70
Credits himself with		11,171 02
Balance in favor of Painter.....		$4,520 68
May 7, 1878, defendant charged himself,		
Money received from sale No. 1.....	$798 00	
Interest.....	203 50	1,001 50
		$5,522 18
Defendant paid, February 18, 1878.....		$1,200 00
May 7, 1878, to M. L. Painter.....		3,095 36
Amount collected from Brown judgment by Painter		1,226 82
		$5,522 18

From this statement defendant had paid Painter all the

money he had received from him; and he so claimed when he made the last payment, May 7, 1878. If it be correct, the defendant is not indebted to plaintiffs and the finding must be for the defendant.

But the plaintiffs say that large amounts of the money collected by Mr. Knox were not paid or remitted to Painter for many years after their receipt, and upon which Knox should be charged interest. It is the duty of an attorney in fact, acting under a letter of attorney, as well as an attorney at law, to promptly notify his client of the receipt of the money for him, and to also pay it promptly on demand. If he fails to do so, I think he is chargeable with interest, after a reasonable time to remit, on the money in his hands.

Defendant, with Judge Olmstead, in 1872, purchased $5,000 of the Lymansville & Germania state road bonds for the sum of $3,916.70, each paying one half of the money, and each owning one half of the bonds. These bonds were dated July 10, 1872, and were payable in two, four, six, and eight years from their date, with interest at 7 per cent per annum. It is in evidence by the letters and declarations of the defendant that the purchase of his one half of the bonds was made with the money of the plaintiffs' testator, then in the defendant's hands; and that, therefore, he is the trustee of the plaintiffs' testator, so far as these bonds are concerned. It is claimed by the plaintiffs that the bonds having been purchased at a discount, and having been paid defendant at their face, with the accrued interest thereon, the defendant is liable for the full amount received on and for the bonds, less the cost of their purchase; that the defendant, as trustee of the plaintiffs' testator, cannot speculate with the funds, but must account for all that is made out of the operation. Such seems to be the law.

The money from the sale of lands, and that received from Brown's and Ives' estate was received by the defendant more than six years before this suit was brought. The statute of limitations prevents any recovery therefor unless the defendant has acknowledged the indebtedness, or promised to pay it within the six years. I am unable to find the evidence, either in the defendant's letters, or in his conversation with M. L. Painter at the time the last payment was made, which relieves the case from the operation of the statute under the rule in Landis v. Roth, 109 Pa. 621, 58 Am. Rep. 747, 1 Atl. 49; Burr v. Burr, 26 Pa. 284;

Miller v. Baschore, 83 Pa. 356, 24 Am. Rep. 187; Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657, and Mayfarth's Appeal, 1 Sad. Rep. 14.

This view would be decisive against the plaintiff were it not for the fact that some of the bonds, which I think were purchased with the money of the plaintiffs' testator, and for the full amount of which the defendant must account, matured within six years of the time this suit was brought. Although not all the bonds were put in evidence, it is proven that they were dated July 10, 1872, and were payable two, four, six, and eight years from their date. Assuming that they were payable in equal proportions, the third instalment was due July 10, 1878, and the fourth, two years thereafter; both of which are within the six years, being $625 and interest at 7 per cent per annum, in six years from July 10, 1872, and a like sum at the same rate of interest, in eight years from that time.

(The referee then proceeded to calculate the amount due by the defendant, in accordance with the foregoing principles, and found it to be $2,511.19; after which he recapitulated his findings of fact and declared the following findings of law:)

1. [That the defendant may retain from the balance in his hands the sums agreed upon for his services in selling the lands and collecting the money.][1]

2. That he is liable to the plaintiffs for all sums received for the Lymansville & Germania state road bonds, less the amount paid therefor.

3. [That the statute of limitations relieves him from the payment of all moneys received by him prior to the 31st day of May, 1877, whether from the bonds of the Lymansville & Germania state road or otherwise.][6]

4. That the statute does not relieve him from the payment of such of said bonds as fell due subsequent to the said 31st day of May, 1877, and the interest thereon to the time of the referee's report.

The plaintiffs submitted the following points *inter alia:*

1. That F. W. Knox, the defendant, by reason of his retention of the moneys of Israel Painter, in his hands, for the length of time and under the circumstances disclosed by the evidence, has forfeited all right to any commissions, either on the sales of lands or collections of moneys for the said Painter; and in

making up his judgment the referee should not allow the said defendant any compensation whatever for services rendered in and about making sales or collecting any of the moneys received by him on account of said Painter.

Ans. Refused.

2. That the said plaintiffs are entitled to recover interest, on the balance of moneys remaining in said defendant's hands, from year to year; and that, in making up his judgment, the referee should allow the plaintiffs interest on said balances.

Ans. Affirmed, except so far as affected by the statute of limitations.

4. That said defendant, having declared in his letters to plaintiff, in the early part of the year 1878, that said bonds were not paid, but would all become due between February and July of that year, and more than $2,500 of said bonds, by the terms thereof, being made due and payable, in July, 1878, and before that date, the presumption, in the absence of evidence to the contrary, is that said bonds were paid in July, 1878, and the defendant is therefore liable in this suit for the amount of principal and interest due on said $2,500 of bonds in July, 1878.

Ans. Refused.

5. That the correspondence referred to, and payments made by defendant, in plaintiffs' request for finding of facts, No. 7, are sufficient evidence of promise to pay, and of payment on the balance due plaintiff, to toll the statute of limitations pleaded by the defendant in this case, and the plaintiffs are entitled to recover any balance of moneys and interest thereon that may be found in the defendant's hands, notwithstanding the plea of the statute.

Ans. Refused.

The plaintiffs' request for finding of facts, No. 7, referred to in this point is as follows: "That some time after April, 1871, the defendant sent or gave the plaintiff a statement containing the amount of moneys received by said defendant, and payments made by him on account of said plaintiff (which statement was put in evidence and marked plaintiff's exhibit 'C'), which showed a balance of plaintiff's moneys in defendant's hands of over $4,000; that subsequently, and prior to March, 1878, a correspondence was carried on between the said parties in reference to the moneys in defendant's hands belonging to the plaintiff, and that said correspondence, and especially the letter of

defendant dated February 10, 1877 (plaintiffs' exhibit 'K'), referred to said statement, and that the payment by defendant to plaintiff of $1,200, in letter of February 18, 1878 (plaintiffs' exhibit 'P'), was made upon the balance shown to be due the plaintiff by said statement."

The defendant submitted the following point:

"That there are no acknowledgments, promises, or payments made by F. W. Knox within six years prior to the bringing of the above suit, sufficient in law to take the plaintiffs' claim out of the effect of the statute of limitations, and that the statute of limitations is a bar to the recovery by the plaintiffs in this suit."

Affirmed, with an exception of $2,511.19, but afterward affirmed absolutely.

Exceptions were filed by both parties, and subsequently the referee filed the following supplementary report:

Having heard the counsel for the respective parties on their exceptions to the report filed February 15, 1886 [I now think I was in error in holding that the defendant was the trustee of the plaintiffs' testator for the bonds of the Lymansville & Germania state road, and that the statute of limitations did not protect the defendant from recovery of the money realized from that portion of the bonds which matured within six years of the commencement of this suit].[8]

There was no agreement between the parties that such purchase should be made, but having purchased them with the funds of the plaintiffs' testator, then in his hands, he put himself in a condition to be made such trustee by the plaintiffs' election. Election is a mode of contracting and therefore must take place between the parties. Downey v. Gerrard, 3 Grant Cas. 64.

The letters of the defendant to the plaintiffs' testator are very indefinite, and do not, in fact, state that these bonds were the papers which he had purchased. Although I, as referee, might find from these letters that the Lymansville & Germania state road bonds were purchased with the money of the plaintiffs' testator, and that these were bonds referred to in the letters, still there is no evidence that the plaintiffs' testator elected to take them, or to hold the defendant as his trustee therefor. The bonds were purchased in July, 1872, without agreement between the parties that the purchase was made for Painter, and he was

informed as early as January 1, 1878, that a purchase had been made. He could then have elected to take them, being within six years of the purchase, and the defendant would have then held them as his trustee, and been bound to account for the money on that portion of them which matured within the six years of the commencement of this suit, and the statute of limitations would not bar a recovery.

[Painter's neglect to make such election within that period deprives him of the right to claim the bonds, and relieves defendant from the position of trustee for them, under the rule in the above-cited case and same case in 24 Pa. 52.][8]

I cannot find, under the case of Fleming v. Culbert, 46 Pa. 498, that the investment of the defendant was such a fraudulent concealment as will prevent the running of the statute of limitations from the time the money collected was demandable.

[I therefore reluctantly hold that the money received from the bonds within the six years from the commencement of the suit does not relieve the case from the effect of the statute of limitations][8] but the statute commences to run from the receipt of the money with which they were purchased, and thus protects the defendant from the recovery of the whole of the plaintiffs' claim.

All the exceptions filed by the parties which are in accordance with this view of the case are sustained, and those inconsistent therewith are overruled.

The referee, therefore, awards and directs a judgment to be entered in favor of the defendant, and against the plaintiffs for costs.

Judgment accordingly.

The assignments of error specified 1, 6, and 8, the portions of the report inclosed in brackets; 2, 3, 4, 5, and 7, the answers to the points quoted: 9, 10, and 11, the action of the referee in awarding judgment to the defendant.

Plaintiffs' exhibits J to Q, respectively, were as follows. They were all signed "F. W. Knox."

Coudersport, Pa., Jan. 15, 1877.

Dear Sir: Last Saturday, I received a letter from you dated Jan. 1. Have received no other; we have not had any mail for nearly ten days, until Saturday last. If you wrote me before,

it may come along yet. We have the deepest snow of years. I will certainly send you some money in very short time and pay you in full within six months. I have issued a great many executions, and am going to close up all my matters. We are now going through a terrible ordeal, one that will try the very foundations of our government.

Coudersport, Pa., Feb. 10, 1877.

Dear Sir: I have been unfortunate in indorsing for a merchant in this county, amount $9,000 that I have got to pay, and will lose likely, about one half; but before I do anything to secure that debt, I make you this proposition: Will add interest to the statement that I gave you, make it in payments, pay $1,000 every four months, until paid, except the first; that made payable, Aug. first; then every four months until all is paid, I to give you judgment note, you to enter the same. There is no judgment against me, and I never expected to have one. I have due me in judgment contracts, etc., $55,000, and, I think, $75,000 in lands and no liens on it. It will then be settled; you will, as I desire above all things that you be secure, and I will know what to meet. If you accept of this, will draw up and send judgment note as stated above and send you; you can enter.

Coudersport, Pa., Jan. 1, 1878.

Dear Sir: Your letter reached me a few days since. On the first of February I will begin to pay to you, and pay monthly until all is paid, interest and all, although I should never have put your money in state road bonds, if you had answered me when I sent you money. The bonds all become due between Feb. and July next, and the money and interest you shall have. I expect to be in Pittsburg before the end of the month, as have hearing before district court there, and will come and see you if not able to come to Pittsburg. Will know in about one week. Near your lands in Cameron County they are putting down several oil wells. Years ago they put down one near and found a little oil at 600 feet, now they are going down 1,500 feet and are down in one well 500 feet and report first sand. I will keep you booked up. Your money I have all in safe bonds and you will get your pay this winter and spring. I, too, have all the latter part of summer and fall been sick, but am very well again. If it is important I will meet you and Collins, but I will certainly be in Pittsburg soon.

Coudersport, Pa., Jan. 24, 1878.

Dear Sir: I can't go to Philadelphia to-day; any day next week can meet you at Harrisburg or Williamsport; still there is no use of meeting; you can look over our account, after I get it partly paid. Will pay during February quite a payment; all your bonds come due before July; there is really now nothing going to Collins; but if you desire will meet you next week.

Coudersport, Pa., Jan. 29, 1878.

Dear Sir: The inclosed letter came back to me last night. I send it that you may see I answered you; also sent telegram. In a very few days you shall have some money, and every cent I owe you before the end of spring. This is the year when tax paper is taken up, and all your money is safely invested in that. I will get part of the money before the end of the month. I mean this shall be so.

Coudersport, Pa., Jan. 30, 1878.

Dear Sir: Your telegram reached me this A. M.— a letter would as soon if mailed Monday. Next week I can and will send you some money, and then quite often until all is paid.

Coudersport, Pa., Feb. 18, 1878.

Dear Sir: Herewith find draft for $1,200—to apply on balance due you. Will you send receipt? I will send again in March. All will be paid in a few weeks. Please answer.

Coudersport, Pa., March 1, 1878.

Dear Sir: Your kind letter is at hand. I can, I feel certain, convert about $2,000 of your paper during the next few weeks and will. Have tried to-day to sell them but could not. All will be paid by July 1st. I have never paid draft drawn upon me and never will. If you can use my notes or note payable as I will likely get funds, this I can send.

Larrabee & Lewis, for plaintiffs in error.—The retention of money by an attorney is a flagrant breach of trust; and where he receives money for his client, and neglects or refuses for a length of time to render an account of, or pay it over, he forfeits all right to claim compensation for his services. Bredin v. Kingland, 4 Watts, 420; Fisher v. Knox, 13 Pa. 622, 53 Am. Dec. 503; Balsbaugh v. Frazer, 19 Pa. 95.

An unfaithful trustee will not be allowed commissions. Robinett's Appeal, 36 Pa. 174; Norris's Appeal, 71 Pa. 106; Seguin's Appeal, 103 Pa. 139; Stehman's Appeal, 5 Pa. 413; Smith's Appeal, 47 Pa. 424.

This contract having been made prior to the rendering of the services, we can see no difference between this and a case in which the commission was claimed under an implied contract, or commissions allowed by law.

Why is an attorney's duty to his client any more sacred, or the breach of it any more flagrant, in an implied, than in an express contract?

The referee, in his answer to the plaintiff's second point, admits the general principle that the defendant would be liable for interest upon the amount remaining in his hands, from year to year; yet he refuses to allow interest for the reason, as he says in his third finding of law, that the statute of limitations relieves him from the payment of all money received by him prior to May 31, 1877.

Interest is due whenever a liquidated sum is unjustly withheld, and is a legal and uniform rate of damages, allowed when payment is withheld after it has become a duty to discharge the debt. Minard v. Beans, 64 Pa. 411; Norris's Appeal, 71 Pa. 106; Stearly's Appeal, 38 Pa. 525; *Re* Dyott, 2 Watts & S. 557; Witman's Appeal, 28 Pa. 376.

The balance of a stated account bears interest from its date. McClelland v. West, 70 Pa. 183.

Having expressly promised, as we claim, to pay the balance due upon said statement, and having made a payment of $1,200 thereon, the debt was renewed, with all its legal rights and incidents, including interest and the forfeiture of his commission; and the defendant could not afterwards limit his own liability, or deprive Colonel Painter of the right to recover every dollar, both of principal and interest.

The identification of the debt in this case is much more explicit, clear, and satisfactory than in the cases relied upon by the referee.

In Landis v. Roth, 109 Pa. 621, 58 Am. Rep. 747, 1 Atl. 49, the note upon which suit was brought was not present at the conversation relied upon to toll the statute; it was referred to, by neither amount nor date; and the only evidence of the conversation was that of the plaintiff.

In Burr v. Burr, 26 Pa. 284, the evidence was that of a single witness, the daughter of the plaintiff; the note was not present at the time of the alleged payment of interest; it was neither referred to by date nor amount; and no express promise to pay it was made. There was merely a small payment of interest upon a note, not specified.

In Miller v. Baschore, 83 Pa. 356, 24 Am. Rep. 187, the letter of the defendant, the only evidence relied upon to prove a new promise, referred to "balance of a note I owe you." The note was not identified in the letter by date, amount or otherwise.

In Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657, the court below was reversed for saying to the jury that in order to make the defendant liable "he should make an actual promise to pay within the six years, should admit it and say he would pay it before he would now be liable therefor;" and a *venire facias de novo* was awarded, although the evidence of a new promise was that of the plaintiff alone, was denied by the defendant, and the identification and promise were neither as specific, clear nor satisfactory, even if it had not been contradicted, as in the case at bar.

In Mayfarth's Appeal, 1 Sad. Rep. 14, at the conversation in which the alleged acknowledgment occurred, the note was not produced, nor was it referred to by date, amount or balance due thereon, the only specification being a note.

In neither of these cases cited was the note, or evidence of indebtedness upon which the plaintiffs' claim was founded, afterwards produced to or admitted by the defendant to be correct; nor did he, as in the case at bar, claim credit on the debt in suit, for a payment made within six years of the action. Had such been the case, can there be any doubt that the question of identity of the debt would have been decided in favor of the plaintiffs?

To take a case out of the statute of limitations it is not essentially necessary that the promise to pay should be actual or express. A clear, distinct and unequivocal acknowledgment of a debt is sufficient. It must be an admission consistent with a promise to pay. Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657; Yaw v. Kerr, 47 Pa. 333; Patton v. Hassinger, 69 Pa. 311; Yost v. Grim, 116 Pa. 527, 8 Atl. 925.

The statement of an account is a clear admission of a precise

indebtedness in answer to the statute of limitations. McClelland v. West, 70 Pa. 183.

An offer by the defendant to give a new note, in the place of one barred by the statute, is such a clear and unequivocal acknowledgment as will take the case out of the statute. Frey v. Holben, 11 W. N. C. 349.

A payment on account of an existing debt is an unequivocal acknowledgment and will take it out of the statute of limitations. Barclay's Appeal, 64 Pa. 69; Wesner v. Stein, 97 Pa. 322.

The bar of the statute of limitations may be avoided by proof of fraud in the defendant, which has prevented the plaintiff from asserting his rights, until a period beyond the time limited by the statute. Marsden v. Marsden, 15 Phila. 80; Harrisburg Bank v. Forster, 8 Watts, 12; Bricker v. Lightner, 40 Pa. 199; Hughes v. First Nat. Bank, 110 Pa. 428, 1 Atl. 417.

Any conduct or declarations of the defendant, tending to mislead the plaintiff and throw him off his guard, although made in good faith, will prevent the running of the statute. Morgan v. Tener, 83 Pa. 305; Wickersham v. Lee, 83 Pa. 416.

The referee reports that he cannot find under the case of Fleming v. Culbert, 46 Pa. 498, that the investment of the defendant was such a fraudulent concealment as will prevent the running of the statute, etc.

It is not the investment, but the statements of the defendant that the bonds will become due between February and July, 1878, that is claimed as the fraudulent concealment. These letters of the defendant clearly show that they were in answer to letters of Colonel Painter, asking for money and inquiring why it was not paid; and such statements as were made by the defendant were either fraudulent and clearly tended to mislead Colonel Painter, or they were true; and if true, then the defendant has received the money on $2,500 of the bonds of plaintiffs' testator, within six years of the bringing of this suit, and the plaintiffs are entitled to recover the same, with interest.

If a trustee or other person acting in a fiduciary relation, employs another's property or money in a speculation, there will be a constructive trust as to the profits so made for the benefit of the owner standing in the opposite relation. Manual of Eq. Jur. p. 176; Norris's Appeal, 71 Pa. 106.

An election to confirm or avoid the acts of a trustee may be

made by bringing suit. Boerum v. Schenck, 41 N. Y. 189; Leisenring v. Black, 5 Watts, 303, 30 Am. Dec. 322.

A widow may make her election under her husband's will by commencing an action to recover a mortgage, the subject of the bequest. Schweitzer v. Stoeckel, 4 Phila. 281.

A landlord to whom a tenant owes both rent and an account, and who has received payments generally, without application by either party, by issuing a distress for the rent, without applying any of the payments thereon, thereby elects to apply the payments on the account, in an unmistakable manner. Garrett's Appeal, 100 Pa. 597.

M. F. Elliott and *Benson & Dornan,* for defendant in error. —The referee having found as a fact, the evidence being undisputed on that subject, that the moneys were received by defendant more than six years before this suit was brought, it follows, as held by the referee, that the statute of limitations prevents a recovery, unless the defendant has, within the six years, made such an acknowledgment or promise as would legally take the case out of the operation of the statute. Now, the suit was brought on the 31st of May, 1883, and any acknowledgment or promise to take the case out of the statute must have been made within six years previous to that time, or on or after May 31, 1877. If this be so, the letter of February 10, 1877 (plaintiffs' exhibit "K"), must be considered as practically out of the case, so far as this question is concerned. But we find that, even if written late enough in time, it is totally insufficient under the decisions hereinafter quoted to affect the running of the statute. It refers to no specific statement, and gives no means of identification of the statement it alludes to, either as to date, nature of claim, or any other means.

The evidence shows that the defendant made several statements to Israel Painter, all previous to this letter, but at different standings of their accounts. It does not identify which one of these statements is meant, if either of them; or it may have referred to a statement concerning an entirely different indebtedness than the one in suit. The attempt to prove which statement this letter alludes to by a reliance upon the fact that the defendant long afterwards said a certain statement was correct, when he paid all he alleged he owed on it, must be unavailing, for that not only does not identify what statement was

meant by the letter, but it could have no legal effect if it did. It could not relate back and breathe life into the letter so as to make it legally operative from its date, when it had for years been in itself inoperative for want of reference to any certain indebtedness. Hobough v. Murphy, 114 Pa. 358, 7 Atl. 139.

A naked admission of an indebtedness, without indicating the amount of the debt or of the promised payment, or of the nature of the claim, will not prevent the bar of the statute. Shitler v. Bremer, 23 Pa. 413.

Any uncertainty in the identification of the debt is fatal to the plaintiff's recovery. Burr v. Burr, 26 Pa. 284.

There must be no uncertainty as to the particular debt; the acknowledgment must be so distinct and unambiguous as to remove hesitation as to the debtor's meaning. Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657.

The promise will not operate to remove the bar of the statute, unless the debt is so clearly identified and so distinctly acknowledged as to be beyond doubt. Landis v. Roth, 109 Pa. 621, 58 Am. Rep. 747, 1 Atl. 49; Painter's Appeal, 3 Sad. Rep. 480; Mayfarth's Appeal, 1 Sad. Rep. 14; Wolfensberger v. Young, 47 Pa. 516; Miller v. Baschore, 83 Pa. 356, 24 Am. Rep. 187.

It makes no difference that there was no evidence of the existence of any other indebtedness between the parties. Landis v. Roth, 109 Pa. 621, 58 Am. Rep. 747, 1 Atl. 49.

An acknowledgment and offer to pay the principal of a debt coupled with a refusal to pay the interest takes the principal out of the statute but not the interest. Graham v. Keys, 29 Pa. 189.

The whole case is a question of interest, which the plaintiffs attempt to charge the defendant with, the defendant having paid up in full all the moneys collected and all the interest he ever expected to pay, and the plaintiffs trying to charge him with extra interest and drag such charge from behind the bar of the statute of limitations on the ground of acknowledgments or promises, although the defendant never expected to pay such interest, and always denied his liability to pay it.

The plaintiffs are concluded by the referee's finding of fact on the subject of the statute; for if this case were tried before a jury, all that the plaintiffs would be entitled to, in any event, would be that the jury should find upon the fact whether there

were acknowledgments made by the defendant in his letters or in his conversations,—the court explaining the rule to the jury, —and if the jury found there were no such acknowledgments their finding would have been conclusive.

And the referee being unable to find the evidence, either in the defendant's letters or in his conversations, relieves the case from the operation of the statute under the ruling in Landis v. Roth, 109 Pa. 621, 58 Am. Rep. 747, 1 Atl. 49; his finding is as conclusive as the verdict of a jury. Brown v. Dempsey, 95 Pa. 243.

The fact that the referee also finds, as matter of law, that the statute relieves the defendant from the payment of all moneys received by him prior to the 31st day of May, 1877, whether from the bonds of the Lymansville & Germania state road, or otherwise, does not impair the effect of the above finding of fact by him.

This investment, it is expressly decided in Fleming v. Culbert, 46 Pa. 498, did not have the effect of arresting the continuous running of the statute, and the statute continued to run against all the moneys, including the moneys invested in the bonds. But as to the moneys invested in the bonds, the plaintiff acquired, from that investment, the incidental right, arising from his right to have or collect the money so invested, to take the bonds in which the money had been so invested instead of the money itself, if he desired or deemed it to be to his advantage so to do. Such an election, if made, would make the defendant the trustee of the bonds for the plaintiff. Downey v. Garard, 24 Pa. 52, 3 Grant Cas. 64; Eshleman v. Lewis, 49 Pa. 416, 417; Ward v. Brown, 87 Mo. 468; Beardsley v. Root, 11 Johns. 467.

But even if the right to elect to take the bonds instead of the money could exist, independent of the right to collect the money, the statute certainly commenced to run against that right of election from the time that the bonds were purchased in July, 1872, at the latest (Downey v. Garard, 24 Pa. 52), and then must have closed down as a bar in July, 1878, and the bar have remained from that time; for what is there in the defendant's letters to prevent the running or bar of the statute as to the right of election?

But if it were, for the sake of the argument, to be admitted that these letters had the effect of preventing the running of

the statute as to the right of election to the times they were written, it would then commence to run again, and how would the plaintiffs' case be helped? The last of these letters was written February 18, 1878. There had been no election or word looking towards an election by Mr. Painter up to that time, nor is there a word said on the subject, on May 17, 1878, when Mr. Painter's son settled with the defendant, being sent by his father so to do.

Bringing this suit was not an election.

An express election is made by some single unequivocal act of the party, accompanied by language showing this intention to elect, and the fact of his electing in a positive, unmistakable manner. Pom. Eq. Jur. § 514.

As an election is necessarily a definite choice by the party to take one of the properties and reject the other, his conduct, in order that an election may be inferred, must be done with an intention to elect, and must show such an intention. The intention, however, may be inferred from a series of unequivocal acts. Id. § 515.

An election must be by an unequivocal act. Beatty v. Byers, 18 Pa. 105; Evans's Appeal, 63 Pa. 183; Hoke v. Leman, 8 Serg. & R. 260; Anderson's Appeal, 36 Pa. 476.

Where an action can be attributed to an intention to take one course as well as to an intention to take the other, it will not constitute an election. Padbury v. Clark, 2 Macn. & G. 298.

PER CURIAM:

The only substantial question in this case arises under the plea of the statute of limitations. The age of the claim is such that the statute constitutes a good defense unless the plaintiffs prove some admission to avoid the effect thereof. Unfortunately for them the defendant did pay all that he admitted to be due or unpaid. The effort now is to recover something that he did not admit that he was in any manner liable for, but which the plaintiffs allege he was once liable for and for which he ought to have admitted that he was still liable. This is rather a novel way of avoiding the effect of the statute, and there was no error in holding it to be a bar to the plaintiffs' right to recover.

Judgment affirmed.

Albert E. Fyan, Plff. in Err., *v.* William Cessna et al.

Where two defendants in a judgment presented a petition for a rule to show cause why the judgment should not be opened as to them and they be permitted to make a defense, and the answer of the plaintiff, under oath, to the rule to show cause, expressly avers that these two defendants were sureties only, he cannot be permitted, on the trial of this issue against them, to prove that, in their absence, another joint maker of the note declared that he and one of said petitioning defendants were joint borrowers.

(Argued May 9, 1887. Decided May 23, 1887.)

January Term, 1887, No. 139, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Bedford County to review a judgment on a verdict for defendants in an action on a promissory note. Affirmed.

The following facts appeared at the trial in the court below before BAER, P. J.:

July 28, 1881, on application of J. B. Cessna, plaintiff loaned to him the sum of $600, on a judgment note signed by J. B. Cessna, William Cessna, and William L. Moseby, to the order of Albert E. Fyan, for the sum of $600, payable two years after date.

On March 22, 1884, J. B. Cessna paid $72 to said Fyan which was indorsed on the back of the note as follows:

March 22, 1884, received on the within seventy-two dollars, interest from July 28, 1882, to July 28, 1884.

$72.00 A. E. Fyan.

J. B. Cessna failed in September, 1884, and the plaintiff caused a judgment to be entered on the note on which a fi. fa. was issued. Thereafter William Cessna and William L. Moseby presented a petition to the court for a rule to show cause why the judgment should not be opened as to them and they be permitted to make defense, alleging that they signed said note as sureties; that they received no money or personal benefit upon said note, and that the payee therein named, in consideration

NOTE.—See note to Wolfe v. Gordon, 4 Sad. Rep. 307.

of the payment by the principal, J. B. Cessna, of interest in advance to July 27, 1884, extended the time of payment of said note to such time without their knowledge or consent and to their prejudice.

To this petition the plaintiff filed an answer which set forth that on July 27, 1881, plaintiff loaned to J. B. Cessna $600, "and took his single bill for the amount with William Cessna and William Moseby as sureties," payable in two years; that October 26, 1882, J. B. Cessna paid $36 on said note, and on March 22, 1884, $72; that plaintiff never at any time extended the time of payment of said note, nor was there any agreement, arrangement or understanding made with said Cessna that would have prevented him from proceeding to collect the same from the principal, if notice so to do had been given by the surety or sureties. This answer was verified by the plaintiff.

The court made the rule absolute, and depositions were duly taken and filed.

At the trial in the court below, plaintiff offered to prove by Albert E. Fyan that at the time J. B. Cessna got the money, he represented that he and his brother William Cessna were the borrowers; that he got the money for himself and his brother William, and that William Moseby was a surety; that he represented that he was acting as attorney for his brother William in borrowing money; that he and his brother William were joint borrowers, and that the money was loaned on these representations. This was objected to by defendants. Objection sustained and offer overruled. Assignment of error.

The court's charge to the jury was not excepted to, and the jury returned a verdict for the defendants, upon which judgment was subsequently entered.

The assignments of error specified the rejection of plaintiff's offer of evidence, above noted.

William M. Hall and *Alexander King*, for plaintiff in error. —Cited Ogle v. Graham, 2 Penr. & W. 132; Sigfried v. Levan, 6 Serg. & R. 308, 9 Am. Dec. 427; Wiley v. Moor, 17 Serg. & R. 438, 17 Am. Dec. 696; Patterson v. Patterson, 2 Penr. & W. 200; Simpson v. Bovard, 74 Pa. 351; Shaeffer v. M'Kinstry, 8 Watts, 258; Sterling v. Stuart, 74 Pa. 445, 15 Am. Rep. 559.

John M. Reynolds for defendants in error.

PER CURIAM:

The answer of the plaintiff under oath, to the rule to show cause why the judgment should not be opened, expressly avers that these two defendants were sureties only. He cannot now be permitted, on the trial of this issue against them, to prove that in their absence J. B. Cessna declared that he and his brother were joint borrowers. On no correct principle governing the admission of evidence could this be admitted. The specifications of error are not sustained.

Judgment affirmed.

William Allwein, Plff. in Err., *v.* John F. Werntz et al., Exrs.

In an action on a refunding bond, the condition of which was to refund so much of a legacy paid by the executors as should be necessary to pay any debt or demand against the estate, *held*, that claims of legatees are demands against the estate in the hands of the executors.

In such action the final account of the executors and the report of the auditor making the distribution of the balance in the executors' hands are competent evidence to prove a breach of the bond.

(Argued May 6, 1887. Decided May 23, 1887.)

January Term, No. 377, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Lebanon County to review a judgment on a verdict directed for plaintiffs in an action on a bond. Affirmed.

This action was brought by the executors of George F. Mars against William Allwein, to recover on a refunding bond the difference between the amount of a legacy paid to one Polly Allwein and the amount distributed to her by the orphans' court. The condition of the bond appears from the charge of the court to the jury, given below.

On the trial plaintiffs, to prove their case, offered in evidence the will of the testator, a certified copy of the plaintiffs' account as executors, confirmed by the orphans' court, and the report of the auditor making distribution of the balance in

the hands of the executors, and the filing and confirmation of the same.

The account and auditor's report were objected to by defendant, upon the ground that the evidence was incompetent and irrelevant to affect the issue. The court overruled the objection in these words:

"In our opinion the evidence is competent to prove a breach of this bond, and the objections are overruled and the evidence admitted. This ruling applies to the account and the report together, and not separate."

Further facts appear from the charge of the court to the jury, as follows:

This suit is brought upon a refunding bond given by the defendant, William Allwein, to the executors of George F. Mars. The action is brought to recover the difference between the sum paid Polly Allwein, who was a legatee under the will of George Mars, in January, 1883, and the amount subsequently distributed to her by the orphans' court of Schuylkill county in February, I think, 1884. It is admitted that the settlement then made was a full and complete settlement of the estate of George F. Mars, and therefore it follows that the amount thus decreed to her by the orphans' court was the full amount to which she was entitled under the will. She received $2,950 in January, 1883, and the claim is made now that under the following condition (which I will read to you) there is an obligation to pay back the difference between the amount actually received and the amount which she ought properly to have received. The condition is this:

"Now the condition of this obligation is such that if any part of this sum so paid to the said Polly Allwein shall at any time appear to be wanting to discharge any debt or demand against the estate of said deceased which the said executors shall not have other assets to pay, then and in such case, if the said William Allwein, his heirs, executors or administrators shall and do return the said legacy, or said sum or such part thereof as shall be necessary for the payment of the said debt or demand and the cost and charges attending the recovery of the same, then this obligation shall be void."

We hold in this case that the evidence produced before us is competent to establish that a portion of this bond is needed

to discharge a debt or demand against the estate of said deceased, and (at least in the absence of any other evidence contradicting the account and the auditor's report taken together) that the plaintiffs have made out a good case.

[We do not now decide that the papers are conclusive evidence upon that subject; but there is no other evidence in the case, except these papers; and upon them we say your verdict must be in favor of the plaintiffs, for the difference named, with interest from the time demand was made, which appears to have been August 11, 1885.] The amount as calculated is $383.80, —$358.70, and interest $25.10.

You will render a verdict for the plaintiffs for that amount.

Exception noted for the defendant.

Verdict and judgment accordingly.

The assignments of error specified the action of the court in admitting in evidence the account of the executors, the auditor's report, and the portions of the charge inclosed in brackets.

Josiah Funck & Son for plaintiff in error.

Grant Weidman for defendants in error.

PER CURIAM:

Language more specific might have been used than that contained in the condition of the bond; yet we think the purpose and extent of its protective power do not admit of reasonable doubt. It was given to the executors for their protection and to enable them to properly distribute the fund which they held in trust for the benefit of all persons entitled to any portion thereof. The legatees are entitled to share therein. Their claims are demands against the estate of the decedent, in the hands of the executors.

Judgment affirmed.

John Stewart's Appeal.

A defendant in an execution against personal property, who has full

NOTE.—A claim of exemption should be made prior to the advertisement of the sheriff's sale. Williamson v. Krumbhaar, 132 Pa. 455, 19 Atl. 281.

knowledge of a levy at the time it is made, is not entitled to $300 exemption under the act of April 9, 1849, if, without good cause, he postpones making any request to have the property appraised until the day on which it is to be sold.

Mere ignorance of the law is not good cause for such delay.

(Argued May 11, 1887. Decided May 23, 1887.)

July Term, 1887, No. 71, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a judgment of the Common Pleas of Perry County making absolute a rule to set aside an appraisement under claim of exemption. Affirmed.

The facts as they appeared by the petition for the rule and the answer thereto, being undisputed, were stated in the opinion delivered in the court below by BARNETT, P. J., which was as follows:

Plaintiff's application sets forth that the sheriff levied, on March 12, 1887, on the defendant's personal property. The defendant was personally present at the time, and no demand was made for the benefit of the debtor's exemption. The sheriff put up advertisements to sell the property levied, on March 21, 1887, and on the said appointed day of sale, the defendant, through his counsel, demanded an appraisement under the exemption act of 1849. The sheriff had the property levied on appraised, amounting to $167, and indefinitely postponed the sale. Plaintiff now moves to set aside said appraisement, because the demand for it was made too late.

The defendant in his answer admits the facts above stated, but alleges as his excuse for not making an earlier demand for appraisement, that "immediately upon said levy being made, upon the same day, and as part of the same act, he (the sheriff) put up the bills for the sale of the said property, so that there was no space of time between the act of levy and the advertisement, or, in other words, the levy and the putting up the bills were all one act."

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and in case of a fi. fa. upon realty before a *vend. ex.* is issued. Moore v. McMorrow, 5 Pa. Super. Ct. 559; Lancaster Trust Co. v. Gouchenauer, 6 Pa. Super. Ct. 209, 15 Lanc. L. Rev. 41. In Johnston Harvester Co. v. Fite, 4 Pa Co. Ct. 415 and Gerhab v. Blank, 5 Montg. Co. L. Rep. 126, it was allowed when demanded upon the day of advertisement. In any case it is too late if made after sale. Gibbons v. Gaffney, 154 Pa. 48, 26 Atl. 24.

The answer further alleges that the defendant made a continued effort to raise the money, and it was not until March 19 that he notified his counsel that his effort had failed, and said counsel then notified the sheriff some three hours before the time fixed for the sale, that the defendant would claim the benefit of the exemption law, and it is argued that under these circumstances the claim was made in time.

The act of April 9, 1849, provides that "property to the value of $300 . . . shall be exempt from levy and sale on execution, or by distress for rent." It further provides that the officer charged with the execution shall, if requested, summon appraisers to appraise the property which the debtor may elect to retain, and the property thus chosen and appraised shall be exempt from levy and sale, etc.

We cannot agree that the levy and advertisement "were all one act." The advertisement succeeded the levy; the claim of exemption under the circumstances should have preceded, and thereby have prevented, the levy. The act of 1849 exempts both from levy and sale. When the debtor is present he should ordinarily make his demand before the levy. When he is absent, under certain circumstances, it may be made after the levy. But except in the most extenuating circumstances, the claim must be made before the day of sale. The general rule is that the claim must be made before advertisement of sale.

According to the weight of authority the claim in this case, having been made after advertisement, was made too late. Dieffender v. Fisher, 3 Grant Cas. 30; Diehl v. Holben, 39 Pa. 213, and cases therein cited; Cable v. Buckman, 1 Pittsb. L. J. 82.

And because made too late, we think the plaintiff is entitled to have it set aside. Seibert's Appeal, 73 Pa. 359.

And now, April 11, 1887, the appraisement is set aside, and the sheriff permitted to sell the property levied on.

The assignments of error specified the action of the court, in setting aside the appraisement.

Sponsler & Markel, for appellant.—The appellant consumed some little time in making the most strenuous efforts to raise the money. When he failed in this he then consulted counsel as to his rights, and in this he was justified, and time should have been given him so to do. Elliott v. Flanigan, 37 Pa. 426.

In Hammer v. Freese, 19 Pa. 255, the claim of the debtor was not allowed; but the demand for exemption was not made until an hour after the time, when sale of the property advertised was to begin.

When the defendant's demand does not delay plaintiff it is in time. Com. *ex rel.* Collins v. Boyd, 56 Pa. 404.

In Rogers v. Waterman, 25 Pa. 182, the defendant loitered about with the full knowledge of his property being advertised and his rights under the statute, yet neither consulted counsel nor moved in any wise to accept the bounty of the statute.

W. N. Seibert, for appellee.—The time for demanding the exemption is at the levy, or, at latest, before the advertisement of the sale, unless absence or other good cause be shown to excuse the delay. Gilleland v. Rhoads, 34 Pa. 190; Elliott v. Flanigan, 37 Pa. 426.

In this case defendant in the execution has shown neither absence nor other good cause to excuse his delay.

PER CURIAM:

With full knowledge of the levy at the time it was made, the defendant postponed making any request to have the property appraised, until the day on which it was to be sold. This was clearly too late, and the learned judge did right in setting aside the appraisement.

Decree affirmed and appeal dismissed, at the costs of the appellant.

George Heffley et al., Plffs. in Err., *v.* Josiah Poorbaugh et al.

A judgment sustaining a will, attacked on the grounds of undue influence and want of testamentary capacity, affirmed.

(Argued May 11, 1887. Decided May 23, 1887.)

July Term, 1886, No. 216, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and GREEN, JJ. Error to the Common Pleas of Somerset County to review a judgment for defendants in a feigned issue to try the validity of the will of Elizabeth Keiser. Affirmed.

The assignments of error were based upon the admission of certain offers of evidence by the defendants, upon the portions of the charge inclosed in brackets, and upon the answers to points, as stated below.

On the trial, defendants offered to show that Josiah Poorbaugh, a witness on the stand, and Hertz Keiser, husband of testatrix, "were in business for many years, and that witness's opportunities for becoming intimately and thoroughly acquainted with Mrs. Keiser were very numerous; and that by reason thereof he did become so acquainted, and that they were very intimate and on the best of terms for a long period; and that he has a complete and thorough knowledge of her mental capacity."

Plaintiffs' counsel objected to that portion of the foregoing proposition wherein it is proposed to show that the witness was in business with Hertz Keiser.

Objection overruled and evidence admitted. First assignment of error.

The following question was put to the same witness:

"*Q.* Had you rare and few or many and good opportunities of becoming acquainted with the condition of his wife, Mrs. Keiser?"

Objected to that the question is too specific, and that it ought to be in a general sense.

Objection overruled and question admitted. Second assignment of error.

The defendants' counsel proposed to show by the same witness the condition of Mrs. Keiser's mind, her acts, and her declarations up to the time of her death.

Objected to as irrelevant.

Objection overruled and offer admitted. Third assignment of error.

The defendants' counsel proposed to prove by the same witness that at the time of Hertz Keiser's last visit with his wife to Berlin, in the fall of 1884, and in her presence, Mr. Keiser asked the witness if he knew where he kept his papers and where his secret drawer was, and that Poorbaugh replied that he did not. Keiser then said: "The first time you come over I will show it to you." Mrs. Keiser then spoke up and said: "Yes; and if anything happens, come quick, because they are on the watch to grab."

Objected to as irrelevant.

Objection overruled and evidence admitted. Fourth assignment of error.

Miss Lizzie Poorbaugh being on the stand, defendants' counsel asked her:

"*Q.* Did you ever hear her (Mrs. Keiser) express an intention or desire as to what should become of her property as much as eight or ten years ago?"

"*A.* I did."

Objected to as incompetent; that her intentions eight or ten years ago could not govern now.

By the Court: "The evidence is pertinent only as it bears on the question of undue influence."

Objection overruled and evidence admitted. Fifth assignment of error.

The defendants' counsel proposed to prove by the same witness that shortly after the funeral of her husband and subsequently, Mrs. Keiser repeatedly declared that she could not and would not return to John H. Uhl's; and this because it has been alleged here that she was unduly influenced and kept away from Mr. Uhl's.

Objected to.

By the Court: "As the question of undue influence has been raised here, and the person at whose house she remained after her husband's death is a devisee and claiming under this will, it is evidence; it is somewhat remote it is true, but still it is evidence on that question."

Objection overruled and evidence admitted. Sixth assignment of error.

George Johnson being on the stand, defendants' counsel asked him:

"*Q.* From your knowledge of the woman, Mrs. Keiser, your conversation and intercourse with her, and what you saw and heard at that time, was she or was she not competent to make a will?"

Objected to, not on account of the form of the question, but because the witness has not made himself competent to speak on the question of Mrs. Keiser's competency to make a will.

Objection overruled and question permitted. Seventh assignment of error.

Mrs. Valentine Hay being on the stand, defendants' counsel asked her:

"*Q.* Had you any conversation with Mrs. Keiser about her situation and the degree of comfort she enjoyed at Uhl's; and if so, what was that conversation?"

Objected to.

By the Court: "On the question of undue influence it is evidence; on the other question it is not."

Objection overruled and evidence admitted Eighth assignment of error.

The charge of the court below, BAER, P. J., was as follows:

The right to make a will and dispose of property, real or personal, according to the notions and wishes of the owner, is solemnly assured to every man by the law. It is a right which courts and juries must not disregard. To do so would be to substitute the will of the court and the jury for that of the testator, and that we dare not do. We are not here to make a will. Every sane man or woman has a right to dispose of his or her property precisely as he or she pleases, unless in some way controlled by some rule of the law, or because there is some provision of the law that prevents a certain disposition. Even an injudicious disposition of property, in the eyes of one's friends, will not avoid a will. It does not often happen that a man bequeaths his estate to the entire satisfaction of his family or relatives, and it is wholly immaterial whether they are satisfied or not; with his own he can do as he pleases. The purpose of making a will is not to divide a man's possessions equally among his relatives or the members of his family; on the contrary, the very purpose is that of creating inequality. The law itself gives equality when no will is made; but to create inequality requires a will. It may be harsh, it may seem unjust, it may indicate prejudice or partiality; yet all this is of no concern to you or the court, because, with a man's own he can do as he pleases.

We have nothing to do with the wisdom of the will in this case. Our duty is to inquire faithfully whether the paper alleged to be the will of Mrs. Keiser is her last will, and whether it was made when she well knew what she was doing, and not under undue influence. These are the two questions that are now before you.

The execution of this will, that is the signing of it, is made out beyond dispute. She signed it, if Mr. Brubaker and Mr. Seibert are believed; and there is no reason for disbelieving

them on this point. If she was of sound and disposing mind and memory at the time she signed it, and if it was not made through undue influence, it is her last will; and, in such case, it will be the duty of the jury to so find.

The supreme court, in the cases of late years coming before it, has said that "the growing disposition of courts and juries to set aside last wills and testaments, and to substitute in lieu thereof their own notions as to what a testator should do with his property, is not to be encouraged." I call your attention to this modern tendency to caution you from running into such error; because in a will case the duty of the court differs somewhat from that in an ordinary trial of a question of fact before a jury. In a will case the court must determine for the jury the sufficiency of the evidence; and it becomes my duty in this case to say to you that the evidence of the facts themselves, as to what occurred, is for the jury; but as to what such facts, when proven, constitute or make out, is a question of law for the court. In other words, you are the judges of what facts are proven; but the sufficiency of the facts, to make out capacity or incapacity, is for the court; and that the court must determine to you, no matter how unpleasant, in any particular case, it may be. In determining the question, you have nothing to do with the matter of one or a few relatives getting more than others; except in so far as such a disposition may have been made under undue influence, and the extent to which it bears, if it bears at all, upon the question of soundness or unsoundness of mind.

The first question is: Were her mind and memory sufficiently sound to enable her to know and understand the business she was engaged in, at the time when she executed the will? We are not left in the dark as to that, for the courts have decided that a person of sound mind and disposing memory is one who has a full and intelligent knowledge of the act he is engaged in, a full knowledge of the property he possesses, an intelligent perception and understanding of the disposition he desires to make of it, and of the persons and objects he desires shall be the recipients of his bounty.

If Mrs. Keiser understood in detail all that she was about at the time she made this will, and chose with understanding and reason between one disposition and another, and herself directed how her property should be given, and to whom, this was sufficient mind to make a will. So the supreme court rules, and you

and I are bound by that ruling. If, from any cause, she was so enfeebled as to be incapable of knowing the property she possessed, or knowing or realizing the effect of a disposition of it, or of understanding to whom she intended to bequeath it, then she was without the requisite testamentary capacity.

It is ruled as law that, in order to make a valid will, one must have memory; a person in whom this faculty is totally extinct cannot be said to possess understanding for any purpose; [but one's memory may be very imperfect; it may, at the time of making a will, be greatly impaired by old age or disease, even to such an extent as to leave the person unable, at all times, to recollect the names of friends, or to recollect persons or families, whom he or she had well and long known and been intimately acquainted with. Idle questions may at times be asked; and questions already asked and answered may be repeated; yet, with all this, the mind may be sufficiently strong and sound for many of the ordinary transactions of life and for making a will. One may have sufficient mind to make a will, when, at the same time, he or she would not have sufficient vigor and strength of intellect and memory to make and digest all the parts of a contract; so the rule is that it requires a sounder and stronger mind and memory to enter thoroughly into the details of a contract than it does to make a will; for all that is required to render her capable of making a valid will is that her mind and memory, at the time of making the will, shall be sufficiently sound to enable her to know and understand fully the business she is engaged in.][19]

Failure of memory is not sufficient to create incapacity, unless it be a total failure of memory; or unless the failure of memory, at the time of making the will, extended to one's family or property. Does such total failure of memory appear from the evidence in this case? This is a question of fact for you.

Sickness, old age, great distress, or bodily affliction, none of these are alone sufficient to incapacitate Mrs. Keiser from making a will. The case is to be determined by you on the facts; and, though many witnesses were called who expressed opinions, it is not to be determined by the mere force of numbers, expressing opinions one way or the other. Witnesses who are not experts—and in this case none are experts but the physicians called and, in a sense, the attesting witnesses to the will—can only give opinions as to capacity, after having stated facts within

their own knowledge, tending to show an unsound condition of mind; and whether a witness has testified to such facts as warrant an opinion is for the court to decide. A mass of testimony has been received, and opinions permitted to be given on facts that but faintly tended to show unsound condition of mind. The opinion of incapacity, founded upon facts that barely tend to indicate unsoundness, must be like the facts on which it is founded, weak in a degree proportioned to the weakness of the facts, and not strong like an opinion based on facts fully stated, which strongly indicate or tend to show unsoundness.

Hence you must exercise all your reasoning faculties, and must look to the facts detailed by the witnesses, and, in the light of the law as we lay it down, say and determine whether the witnesses' opinion was one justly and fairly deduced from the facts. It is our duty to say that an opinion based upon mere forgetfulness of names of persons, or upon mere forgetfulness of something just previously said or done, or upon the fact that Mrs. Keiser had great pain in her head, or that she was suffering from distress caused in some way, or that she said: "I fear I will lose my mind," or merely said: "My mind is so bad," is not, in itself, sufficient basis for an opinion that her mind was unsound, or that she was incapacitated to make a will. The facts upon which the opinion of unsoundness is based must be stated by the witness to the jury; and they must be such facts as tend to show that she had not sufficient mind or memory to comprehend and understand the business she was engaged in, or the conversation she was having at the time.

The importance of heeding these views must be apparent to the jury, for a most estimable gentleman, Mr. Megahan, testified as to the incapacity of this woman, and said very frankly that she was incapable of making a will; but, when tested on cross-examination, it was demonstrated that he would consider her incapable, although she might be precisely in that condition which the law regards as constituting capacity to make a will. Hence it is that the court, in a will case, must be specific, and guide you on the question of the sufficiency of the evidence.

So too, the opinions of Christian witnesses, whose conclusion, that the mind of the testator was unsound, is based on the fact that she did not treat all her relatives alike, or did not give all or any to the church, should, alone, have no weight in this case. You are not trying any such question. Such witnesses do not

know that, under the law, the owner of property can do with it as he pleases; and that, when one leaves neither parents, husband, wife, nor issue, there are no natural objects of one's bounty.

If, on careful consideration, looking at the witnesses on both sides—all of whom stand equally respectable and all of whom, testifying and giving opinions, are to be viewed alike and their opinions weighed on the facts stated, whether in favor of capacity or incapacity—and keeping in view the principle that all men are presumed to be of sound mind and must be so considered by a jury until unsoundness has been proved, if, we say, in the light of this principle of law and all the facts, you should find that the plaintiffs, who allege unsoundness of mind and want of capacity, have failed to prove it, then the case ends; and your verdict, without further inquiry, should be for the defendants.

The testimony of the plaintiffs is all to be considered, and viewed by you, in the light we have indicated; and, if you find the opinions of the witnesses to be warranted by the facts detailed, and you should find that Mrs. Keiser was of unsound mind before the day on which her will was made, then you are still not ready to decide this case. You then turn to the all-important question in the case, and determine from the evidence what was the condition of her mind on the day the will was made; for, although her mind might have been unsound before, yet if, on that day and at that time, she fully understood and comprehended the nature of the business she was engaged in when she made her will, knew what estate she had, and knew how and to whom she intended to, and did bequeath it, then she had sufficient mental capacity to make her will; and the jury should so find.

The burden of proof to show that Mrs. Keiser was of sound mind at the time of making the will is on the defendants, if you find there was previous unsoundness; otherwise, not. If the evidence has satisfied you that there was previous unsoundness of mind, then the burden is shifted to Poorbaugh and those claiming under the will, to show that at the time of making the will Mrs. Keiser was of sound mind. And this burden then requires that the defendants, Poorbaugh and the other devisees, should show you that, at the time the will was made, looking at the time of dictating the memoranda and the time of executing

the will, testatrix was in such a state of mind and memory as fully to understand and comprehend the estate or property she had, the persons to whom she intended to, and did, bequeath it, and fully to understand the business in which she was engaged; and, if they have so shown by the evidence, they are entitled to the verdict, so far as it is affected by the question of testamentary capacity; and otherwise, not.

It is your duty to view the testimony of all the witnesses who were present at any time on the day the will was made. You have Josiah Poorbaugh, his wife and daughter Emma, as the first ones who were spoken to by Mrs. Keiser on the subject of making a will; they testify that it was by her request that the daughter, Emma Poorbaugh, wrote the memoranda, showing how she wanted the will made. They testify as to what was said about the amount of her estate, who she wanted to receive it, and how it was to be disposed of. If this is proved and not contradicted, does it show a knowledge of her estate and of the persons she wished to give it to? And was it of her own volition and not induced or brought about by these persons or any of them, or anybody else with their knowledge?

Subsequently, if the evidence is believed, you have present on the same day Josiah Poorbaugh and wife and Alexander Brubaker; and a will was made. These witnesses testify as to Mrs. Keiser's handing the paper containing the memoranda to Mr. Brubaker, saying she wanted a will made; that he wrote the will according to the memoranda on the paper, and read it over to her; that she said it was right and signed it; that Alexander Brubaker and William Seibert witnessed it; that she then said to Mr. Brubaker: "Be so kind as to say nothing about this," and received the will and kept it, she occupying a reclining position on the bed at the time. All these witnesses, from all that occurred, stating what did occur, say she was of sound mind.

Others of the family, Miss Lizzie Poorbaugh and Mrs. Poorbaugh, were about her that day and before and after; they speak of what she said and did, and say she was of sound mind. Strangers, too, were in that day. George Johnson says he was there on Monday or Tuesday at 10 o'clock; the family say he was there, that it was on Monday; and one of the daughters says she thinks it was in the afternoon. This is an immaterial contradiction. Was he there on Monday? Whether at 10 o'clock or in the afternoon is immaterial. You have heard his testi-

mony; he says she was of sound mind. Bowman and his wife were there, as they say, on that day and had interviews, the wife holding a long conversation with her; they say she was of sound mind.

As against all these witnesses who were there that day, assuming that Bowman and wife were there also, the plaintiffs, those who contest the will, allege that Mrs. Keiser was, on that day, utterly unfit to make a will; not that she was crazy, because it was not necessary that she should be crazy to render her unfit, but that she was not of a sound and disposing mind and memory. They call, among others, Rev. Mr. Weekly; he says he was there on this as well as on the succeeding Monday. He says that when he was up in her room she was stupid; but he also says she was not unconscious; he says, "I tried to have an intelligent conversation with her but failed;" and he concludes that she was not capable of making a will. He says the second time he was there which was a week later, she was still in bed but able to talk, though somewhat disconnectedly. He says she sometimes talked intelligently for a while, but she could not support a conversation. When this witness was on the stand the first time, he said that he could not say whether Bowman and wife were there on the first Monday or the second; when recalled, he said that Bowman and wife were there on the second Monday; and he gives a reason, stating that Mr. Pershing was not there any more at that time.

If she was stupid when Weekly was there, was she so at the time the will was made? Could a person be stupid during the short time he was in there; and, after that, during some other portion of the day, be perfectly conscious and of sound mind? That is a question of fact for this jury. Was this a temporary stupor? Can his testimony, when he says that she was stupid, and that of the other witnesses who testified to what she did and said on that day, of her having spoken and given directions, sat up in a recumbent position, and signed the will—can that be reconciled, if, in point of fact, there was a state of stupor continuing throughout the whole day? She may have only been so when he was there; and it may be true that, at other times during the day, she was precisely as the other witnesses say she was when they were there. These are questions of fact for you. Rev. Mr. Weekly says she was then not capable of making a will,

that she was stupid. Did this stupor continue all day? Whether it did or not, you must determine from the evidence.

The next witness was Mrs. Garman. She saw her on Saturday after the funeral, in an unconscious state; she saw her on Tuesday, in bed; and she says she was in the same condition then. She also saw her on Wednesday, when she was better; but she did not see her on Monday.

Mrs. Hartzel saw her on Saturday, and says she was unconscious; and she saw her in bed on Sunday, at which time she was not inclined to talk. On Monday she went over, but was stopped from going into the room; and so she didn't see her on Monday; but she heard some one in the room talking about $1,000.

Mr. Hartzel saw her in bed at Poorbaugh's on Monday. He says, "I don't know that I said anything to her on Monday; spoke to the others, and said good bye to Aunty."

Miss Permelia Heffley saw her on Monday. She says, "I spoke to her, but she did not reply." Those witnesses from these facts came to the conclusion that, on that day, she was of unsound mind. You will recall what facts they have related. Mr. Hartzel did not hear her reply at all. Miss Permelia Heffley spoke to her, and she did not reply. Whether a witness would be able to say, from that alone, that she was of unsound mind, I do not know. These people may have thought it proper to take into consideration what they knew of her long before, but you must determine what occurred there on that day.

Dr. Geary, the attending physician, says that on Saturday after the funeral he found her in a comatose state, and could not arouse her; and that she so remained two or three days; but he says on Monday she could talk some; so that, according to Dr. Geary's own statement, she was not in a comatose state all the time. He says when aroused on Monday she could talk sensibly; but, he says also, she would go back into a state of stupor again. He says she did not talk to him on Monday, and he judged from appearances; and, from this and from what he saw on Saturday, he considered she was incapable of making a will. It is necessary that the doctor's testimony be fairly taken, because a great deal of comment has been made upon it here, and he is entitled to have the whole that is material before you. He and some of the witnesses for the will differ as to some conversations; but the differences only go to credibility,

not to the material question in the case, except as to this comatose condition.

The material question is: Was Mrs. Keiser, on the day the will was made, of sound and disposing mind, and capable of making a will? It is due to the doctor to say that he said he judged from appearances; and he also said, upon the question being put to him, that if she knew her property and spoke of it, and knew her relations and the reasons for giving to one and not to another, at the time she made the will, then, in his opinion, she would be competent to make a will; and that is what every expert said who was on the stand. The experts do not differ as to the effect of the testimony; they differ only as to whether or not, in point of fact, she was unconscious, or in that comatose state, during this time; and on this question, you will take Dr. Geary on the one hand and these other witnesses on the other. If, during the making of the will, she was unconscious, or in a comatose state, all say, and the law would also say, she could not make a will. So on the other hand, if she had full knowledge of her estate, if she knew the business she was engaged in when she made the will, and knew the persons she intended giving it to, and did give it to, they all say, and the law says, she could make a will.

So the great question is: What was her condition on the day and at the time she made her will? Her condition afterwards was shown to have been one of mental soundness, if the evidence is believed; but this does not establish that she was mentally sound on the day the will was made. It is evidence to be considered by the jury, in connection with the evidence as to her condition on the day the will was made.

We have been asked to charge you and answer numerous points; and that will necessitate somewhat of a recapitulation, because the points are not all so drawn as to enable the court, in its view of the law, to answer them by a simple affirmative or negative; and some of them necessarily draw out remarks that are but in place in such answers.

There is a conflict as to the day on which the Bowmans called on Mrs. Keiser. That they were there is not denied; it is the time that is in dispute. Their testimony is stronger on the question of testamentary capacity involved in this case, if they were there on the first Monday after the funeral, instead of the second Monday. But it is evidence in the case, even though they were

not there until the second Monday; but, in the latter case, it would not be so strong, because it does not come back to the time of the making of the will. It would be subsequent evidence, but would still have to be considered by you.

You must consider all the evidence and all the contradictions in this case. So, too, as to the apparent or real contradiction, if any, of Mr. Poorbaugh by his letters, in so far as it relates to the actual condition of Mrs. Keiser. You will determine the case on all the evidence. What was her real condition on the day and at the time the will was made, as shown by the evidence, including the evidence, if any, of declarations made by the testatrix before making the will, as to any future intentions as to the manner of disposing of her property; which intentions, if any, and if consistent with the will, are evidence to be considered in connection with all that happened on the day the will was made.

We now come to the points that have been submitted by the counsel in this case. The first points are submitted by the counsel of the plaintiffs, that is by the counsel of the parties who say that this will was not made by a person who had a sound mind. What is meant by these points is that the counsel in the case draw them, and ask the court to say to you that the principles of law detailed in them are the law governing the case. If we agree with the counsel in regard to any given point, we affirm it; if we disagree, we refuse it. Sometimes, instead of simply affirming or refusing a point, we qualify it somewhat. By paying attention to what we say in answer to these points, you will understand how we mean to instruct you.

Plaintiffs' points and answers thereto.

I. That to render a person incapable of making a valid will it is not necessary that the jury should find that the person making the will was crazy or insane at the time the will was made; but it is sufficient to defeat the will, if the jury is satisfied from all the evidence that at the time the will was made, the testator was, from old age or bodily infirmity or both combined, so weak in intellect as not to understand the nature and effect of the act he or she was engaged in; and if the jury believe that Elizabeth Keiser was in that condition on the 20th of April, 1885, the time when the alleged will was made, then the verdict must be for the plaintiffs.

Ans. This we affirm.

II. That if the jury find from the evidence that Elizabeth

Keiser was, at the time of the making of the alleged will, of weak intellect, was prostrated by disease, was in the home of Josiah Poorbaugh, who with the members of the family are the principle beneficiaries under the will; that she had, besides the legatees named in the will, five brothers and sisters who are not named in the will, and that no cause is shown why said brothers and sisters should have been excluded from the will, the jury may take all these things into consideration on the question whether she had capacity to make a will.

Ans. The jury may take all these facts, if established, into consideration, in connection with all the other facts in the case on the question whether she had capacity to make a will. But in itself, although all the facts named in the point be found by the jury to be true, it is not sufficient to establish incapacity. (Ninth assignment of error.)

III. That the capacity required by law to make a will is that the testator shall have, at the time of making the will, a full and intelligent consciousness of the nature and effect of the act he is engaged in, a knowledge of the property he possesses, an understanding of the disposition he wishes to make of it, by the will, and of the persons and objects he desires to participate in his bounty. And if the jury believe that Elizabeth Keiser, at the time of making and executing the paper, purporting to be her last will and testament, by reason of old age, loss of memory, by bodily infirmity, or any other cause, failed in any of these particulars, so that she either did not comprehend the act she was engaged in, or did not have a knowledge of the property she possessed, or did not understand the disposition she was about to make of it, or the objects of her bounty, then said paper is not her last will and testament, and the verdict of the jury must be for the plaintiffs.

Ans. If the words, "objects of her bounty," in this case, are taken to mean the beneficiaries in the will, the point is affirmed. With that qualification we affirm it. (Tenth assignment of error.)

IV. If the evidence shows that Elizabeth Keiser did not have mental capacity to make a will prior to the 20th of April, 1885, then the burden is upon the defendants to show that she was of sound mind on the day the will was made; and such prior incapacity must be taken into consideration by the jury in determin-

ing the question of her testamentary capacity on the 20th of April, 1885, the day the alleged will was made.

Ans. If the contestants of this will have shown that Mrs. Keiser, prior to the 20th of April, 1885, the day the alleged will was made, had not a sound and disposing mind, had not mental capacity to make a will, then, it is true, the burden is on the proponents of the will, Poorbaugh and the other devisees, to satisfy you by proof that she was, at the time of making the will, of sound and disposing mind. And as the law presumes everybody to be of sound mind and capable of making a will until the contrary is shown, the jury must, when a will is assailed for want of testamentary capacity, take into consideration the fact of prior incapacity, if shown to have existed; and if no soundness of mind is shown at the date of the will, it falls because of prior incapacity; but if, in answer to previous unsoundness, it is shown to the jury that on the day and at the time of making the will she was of sound and disposing mind and memory, and knew and fully understood the nature of the business she was engaged in when making the will, then the will stands, for the jury must decide the case on the condition of her mind at the time the will was made.

V. If the jury believe that it is shown that Elizabeth Keiser was of weak mind, although it was not sufficient in itself to wholly destroy testamentary capacity, but was prostrated by sickness and was in a condition that she could have been easily imposed upon, that she was in the house of Josiah Poorbaugh, and surrounded by him and his family, and they were made the principal beneficiaries under the will, to the exclusion of five of her brothers and sisters, then these facts shift the burden from the contestants to the proponents to show that she had testamentary capacity to make the will, and that due care and caution was taken to guard her against imposition; and if the jury believe that she was not so guarded from imposition and that the will was drawn hastily upon memoranda made by Emma Poorbaugh, and the names of the legatees and beneficiaries furnished by Josiah Poorbaugh, then the jury may fairly conclude that it was not her free act; and the verdict must be for the plaintiffs.

Ans. This point, as drawn, is refused. But if, from the evidence, you find that Mrs. Keiser was of weak mind, although it be not sufficient in itself to wholly destroy testamentary capacity; and if you further find that the will was procured to be

written by Josiah Poorbaugh or Emma Poorbaugh or any one of Josiah Poorbaugh's family; and if she, then being prostrated by sickness, could easily be imposed on by Poorbaugh and family, who are the principal beneficiaries in the will and with whom she then lived, because of great confidence in them—then the burden of proof shifts from the contestants to the proponents, and they, Poorbaugh and the other defendants, the devisees, must show that she had testamentary capacity at the time, and also that she acted with full knowledge of the value of her estate; and if this is shown, the jury cannot conclude that it was not her free act, or the result of undue influence. And this would be so, even though the will was drawn upon memoranda made by Emma Poorbaugh, if the memoranda were made at the request of Mrs. Keiser or on her dictation and read to her, and the will written by a stranger, in conformity to the memoranda, and read to her and accepted as her will and duly executed, and although the names of some devisees were furnished by Josiah Poorbaugh, if the testatrix had directed $1,000 to be given to each of his children, a certain sum to him and his wife and her brothers Henry and Daniel and the residue to certain grandchildren.

If the devisees, the defendants, have shown both testamentary capacity in Mrs. Keiser and full knowledge of the value of her estate; and if the jury find that each of the devisees who was present at the making of the will has, upon the stand, sworn that there was no undue influence used by him or her, or to his or her knowledge, and find that the witnesses are respectively credible and not contradicted—then the jury cannot find against it on the ground of undue influence. (Eleventh assignment of error.)

VI. That although Josiah Poorbaugh, Margaret Poorbaugh, Emma Poorbaugh, Elizabeth Poorbaugh, Anna Poorbaugh, and Samuel W. Poorbaugh are competent witnesses in the case, yet the jury can take into consideration their interest as legatees under the alleged will as affecting their credibility as witnesses in the case.

Ans. Under existing laws Poorbaugh and his son, daughters, and wife, although interested as devisees under the will, are competent witnesses. They stand unassailed; but, being interested, such interest is properly considered by a jury on the question of credibility. It is but proper to say that the same

rule applies to Mrs. Julia Ann Heffley, a sister of the testatrix, who is one of those contesting the will; and although her children are not interested, the question of their near relationship to their mother, the contestant, is also a matter on the question of credibility; and these all stand, like the others, unassailed; and hence you determine their credibility from the testimony of the witnesses themselves, their manner of testifying, the contradictions, if any, and the probabilities of their statements. (Twelfth assignment of error.)

VII. That in a matter of this kind, where there is conflicting testimony as to the condition of the testator on the day and at the time the alleged will was made, and conflicting testimony upon an assumed state of facts by medical experts, the testimony of Dr. Geary, the attendant physician, is entitled to great weight, and if the jury believe his evidence as to the condition of Mrs. Keiser, on the 20th of April, 1885, the day the alleged will was made, then the verdict must be for the plaintiffs.

Ans. The testimony of experts is received to enlighten the jury, but not to control its judgment. Its force, effect, or weight may depend upon how far, by its intrinsic probability, it outweighs all conflicting testimony. The responsibility rests on the jury to render a correct verdict; and hence a jury cannot surrender its honest convictions of the truth, as found from all the evidence and the exercise of sound common sense and judgment, to the opinions of experts, no matter how greatly they are skilled. They must take into consideration the expert's means of knowledge, the reasons he assigns for his opinions, and give credence or withhold it, as they find his qualifications and the reasons he assigns to be sufficient.

Expert testimony is to be tried by the jury like all other testimony; and is to be tried by the same tests, and is to receive so much weight as the jury, in view of all the circumstances of the case, think it is entitled to, and no more. On a question of science like that involved in this inquiry—which is a question whether, at that particular time, testratrix was unconscious or not—an expert's testimony would have to be accepted; unless it is contradicted by the evidence of equally credible witnesses who are not experts, as to facts that common people can testify to as well as experts. An expert physician may be better prepared than the ordinary citizen to say that a sudden attack is paralysis or nervous prostration; but the expert physician is

entitled to no more credit or weight than any other equally credible witness on matters that men and women can see, and hear, and can do as well as an expert can. If credible witnesses say to you that, after her prostration and after the doctor left, she arose and was helped up stairs; that she spoke and ate something that evening or night; ate breakfast, dinner and supper and conversed on Sunday, and ate, could hold a conversation, and sat in a reclining position on her bed on Monday—these are facts that can be testified to and proven just as well by common people who are not experts as by experts; and the expert's testimony, in conflict, is entitled to no greater weight than others, if all are equally credible witnesses. You are judges of the credibility of witnesses; and when none are assailed they stand equally fair before you, and are to be believed, unless, from the evidence given by themselves or others, such inconsistencies, contradictions, or improbabilities are shown as would warrant you, as sensible men, to disregard it in whole or part. It is rarely the fact that experts agree, if called on opposite sides. Their testimony as experts is received from necessity, because it relates to something not seen or apparent, or that cannot be known by ordinary men. It stands no higher in the scale than the evidence of other people; but, like that of others, when uncontradicted, it is to be taken as the truth.

The remark of Dr. Brubaker (that, having heard the testimony of Dr. Geary, he would take the statement of his brother doctor as to her condition as true) was based upon the fact that he, as a physician, was better able to tell it than a layman. You are not to take it to be her true condition, as against the witnesses who say she conversed and washed herself on that day; for when Dr. Brubaker was asked what would be the effect of certain facts inconsistent with those that were testified to by Dr. Geary, he said it would be to show that she was competent to make a will. Dr. Brubaker's remark was to the effect that the facts, as alleged by Dr. Geary, if found to be true as against all the other evidence, would sustain Dr. Geary's opinion; otherwise not. (Thirteenth assignment of error.)

VIII. Even if the jury believe that at the time the alleged will was executed Elizabeth Keiser was able to talk, as certain witnesses present testify, nevertheless if the jury find that she was, at the time, of weak intellect and had been for two or three days prostrated by sickness, then the verdict in this case must

be for the plaintiffs; because it is admitted that Josiah Poorbaugh and members of his family are the principal legatees under the alleged will, and some of these legatees were with her during the whole of the time of the execution of the will and there is no proof that the testatrix was informed at the time of the amount or character of her property, nor who were her relatives.

Ans. We are not prepared to say that the testatrix had not been informed of the character, and had not precise knowledge of the amount and condition of her estate and the proportions and amounts the beneficiaries take under the will; nor at the time there was any weakness of mind, or that such knowledge had not been imparted. The point assumes a set of facts, the existence of which is a question for the jury and not for the court; and the point is refused. (Fourteenth assignment of error.)

Defendants' points and answer thereto.

I. That the testimony offered in this case, in support of, or to establish, the testamentary incapacity of Elizabeth Keiser on the 20th of April, 1885, is clearly insufficient to justify a verdict in favor of the plaintiffs upon this count in the declaration.

Ans. We reserve our answer to this point.

II. That there is no such evidence in this case, showing undue influence, fraud, or imposition, practised upon Elizabeth Keiser at the time of making her will, on the 20th of April, 1885, as would justify the jury in finding a verdict in favor of the plaintiffs on this count in the declaration; and all the evidence in this case upon the subject of undue influence should be withdrawn from the jury.

Ans. We answer this by saying that we have answered it in connection with the fifth point of the plaintiffs.

III. That it is the duty of the court to determine the sufficiency of evidence on testamentary capacity, as well as that of undue influence; that in this case there is no such evidence of either as would justify the jury in finding for the plaintiffs; and the verdict should, therefore, be in favor of the defendants.

Ans. That point raises a question of law, which, so far as the jury is concerned, is immaterial; and we reserve it.

IV. The legal presumption in this case, as in all others, is in favor of the validity of the will.

Ans. This point we affirm.

V. Old age, failure of memory, or mental weakness do not, of themselves, constitute incapacity to make a will.

Ans. This point we affirm. (Fifteenth assignment of error.)

VI. On the question of the testamentary capacity of a dying person, or one suffering from severe illness, the fact of an occasional flightiness or wandering of intellect during sickness is generally of very slight importance.

Ans. We affirm this point.

VII. Notwithstanding temporary mental disorder, the presumption is still that a man is competent when he makes his will; and the contrary must be proved before a jury can find it.

Ans. We affirm this point. (Sixteenth assignment of error.)

VIII. If a testator understands in detail all that he is about, it is quite sufficient to sustain his will; it is not necessary, at the time, to have a recollection of all his estate, his family relations in life, their condition in general and the probable effect the proposed disposition will have, and to collect this all in one view.

Ans. The eighth and ninth points cover, to a large extent, the same ground. The eighth point, with the qualification which we shall give it in the answer to the ninth, is affirmed.

IX. If a testator designs to give the whole of his estate to a stranger, to the exclusion of his collateral relations, or to one or more of such relations to the exclusion of the rest, it is not necessary that he should have a recollection of the property he intends to dispose of or of persons thus related to him.

Ans. If Emma Poorbaugh wrote the memoranda at the request of her aunt, Mrs. Keiser, and as dictated by her aunt, as a guide to a person who should be called to write her will; and if her aunt took the paper after it was read to her, and held it until a scrivener, at her request, was brought, and then handed it to him with directions to draw her will, which, after it was written, was read to her and by her acknowledged to be right, and was signed by her and witnessed, and then kept by her, and she requested the scrivener to say nothing about it; and if by such will, made in conformity with the memoranda, she gave all her estate to her brother, Josiah Poorbaugh, his wife, their children, two grandchildren, and her brothers, Henry and Daniel, she having no issue, husband, or parents—then the soundness of mind which would warrant her in making the will is not affected by the absence of proof that she knew all her rela-

tives. It was enough if she fully knew and comprehended the business she was engaged in while making the will, and knew what property she had, and had knowledge of Josiah Poorbaugh and the other devisees, whom by her will she made her beneficiaries; and as to whether she knew or did not know this, the jury must determine, not only from what was said and done at the very moment of making the will, but also from what was said and done by her on the same day at the time when she directed the memoranda to be made. Both these transactions entered into the making of the will. (Seventeenth assignment of error.)

X. That the condition of this testatrix, at the time of the execution of the will, on the 20th of April, 1885, is the question most carefully to be considered by the jury; and, if she had testamentary capacity at that time they should disregard the evidence of the plaintiffs' witnesses regarding her mental condition at all other times.

Ans. This point is affirmed. (Eighteenth assignment of error.)

In determining this case you may bring in your verdict, either in favor of the will or against it; and we will regulate the form of the verdict when it comes before us.

It is proper for us to say to you that while Dr. Geary, in answer to the hypothetical question put to him by the counsel of the defendants, said that, assuming the facts there stated to be true, Mrs. Keiser was competent to make a will, he said also, at the same time, that from what he had seen of her he did not think she could have been in the condition assumed in the hypothetical question.

[It is also proper to say to you that the memoranda prepared by Miss Emma Poorbaugh were read by Mr. Brubaker before he wrote the will. Mrs. Keiser said to him: "I want my will made;" but the memoranda had been read to her by somebody else, not by Mr. Brubaker. It is, however, immaterial by whom it was read to her.][20]

Coffroth & Ruppel and *W. H. Koontz* for plaintiffs in error.

John Cessna and *H. L. Baer* for defendants in error.

PER CURIAM:

This case presented questions of fact. They were submitted

to the jury in a clear and correct charge. Some extracts disconnected with the residue might appear erroneous; but when considered in connection with the whole charge, they are not inaccurate or misleading. We discover no error relating to the admission of evidence, nor in the answers to the points.

Judgment affirmed.

Jacob Lingenfelter, Plff. in Err., *v.* J. B. Williams, Receiver, Etc.

The refusal of the trial court to grant a continuance is not assignable as error.

In an action on promissory notes, where the defense is payment, and evidence is given to sustain it, and there is evidence tending to prove that they were not paid, whether the notes were paid or not is a question of fact for the jury.

(Argued May 9, 1887. Decided May 23, 1887.)

January Term, 1887, No. 97, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Bedford County to review a judgment on a verdict for plaintiff in an action of assumpsit. Affirmed.

This was an action brought by J. B. Williams, as receiver of the Bedford county bank, against Jacob Lingenfelter, to recover on two notes made by the defendant and discounted by the bank for $50 and $800, respectively, and also for an alleged balance on a book account of $912.92.

Defendant filed an affidavit of defense alleging payment, and obtained a rule on plaintiff to show cause why he should not itemize the statement in his *narr.* "Balance on book account, $912.92." This rule was subsequently made absolute. Plaintiff failed to file a statement of items as required by the rule.

NOTE.—The refusal of a continuance will not furnish ground for reversal. Com. v. Buccieri, 153 Pa. 535, 26 Atl. 228; De Grote v. De Grote, 175 Pa. 50, 34 Atl. 312; Com. v. Bezek, 168 Pa. 603, 32 Atl. 109; Clow v. Pittsburgh Traction Co. 158 Pa. 410, 27 Atl. 1004; Walthour v. Spangler, 31 Pa. 523. But the rule is otherwise where there has been an abuse of discretion, resulting in injury to the applicant. Schrimpton v. Bertolet, 155 Pa. 638, 26 Atl. 776.

When the case came on for trial, on objections by defendant to the presentation of the bank account, the plaintiff moved to amend by filing the same; whereupon, defendant made an affidavit of surprise, and asked that the case should be continued at plaintiff's costs. Thereupon the plaintiff withdrew such offer to amend, and moved to amend by striking out the whole claim except the two notes. Defendant objected to the amendment, and alleged surprise, upon the ground that the notes had been carried into and blended with the account and were a part thereof, and that the cause could not be fairly tried by such separation.

The court disallowed the surprise and defendant excepted. Assignment of error.

Defendant then filed the following amended plea:

"Payment and payment with leave to give special matter in evidence with notice of special matter as filed, and the following additional special matter." Attached to this plea as special matter was a copy of the Lippel check for $1,034, with its indorsements. This plea was allowed by the court, the replication being *non sol.*

The plaintiff offered his notes in evidence and rested. The defendant offered, under his plea of payment, a check of Henry Lippel for $1,034, deposited in the bank, the amount of which had been collected.

John Du Bois, a partner in the Bedford county bank and also cashier, was called by plaintiff in rebuttal. Plaintiff proposed to prove by him that the check of Henry Lippel was presented to the Bedford county bank by Jacob Lingenfelter; that Mr. Lingenfelter took credit on his account for $900 of that check and got the balance in cash; that it did not go to pay these notes, never was so intended or so applied; and further that at the time Mr. Lingenfelter owed the amount of the Lippel check and more to the bank, and that he subsequently checked out more than that much money, and treated it himself as a deposit and not as a payment of this note or either of the notes.

Objected to, because the offer is not evidence under the pleadings, the plaintiff being bound in the pleadings by the replication, and that they cannot set up a set-off against a set-off in this proceeding under the plea.

By the Court: We admit the evidence, the plea of set-off having been withdrawn.

Objection overruled, evidence admitted, exception noted.

Plaintiff presented the following points:

1. When Lingenfelter presented to the bank the check of Henry Lippel and indorsed it, the presumption of law is that he received satisfaction.

Ans. As a general principle this is true; this is the law.

2. That, as the defendant did not lift his notes, and they are not canceled, the presumption of law is that they are unpaid.

Ans. We affirm this point.

3. That there is no such evidence in this case as would justify the jury in allowing any credit to the defendant; and their verdict should be for the plaintiff for the full amount of the two notes and interest.

Ans. If the evidence of the plaintiff's witnesses is believed, which is a question of fact for you, then we affirm this point.

Defendant presented the following points:

1. That the evidence of both plaintiff and defendant showing that Jacob Lingenfelter deposited in the Bedford county bank on the 8th of May, 1884, three days after the $800 note came due, a check for $1,034, and there being no evidence of the money being applied to any other purpose, the presumption of law is that the bank applied the deposit to the payment of the note.

Ans. This point we must refuse, because it assumes what the evidence does not show; there is evidence for the jury to consider as to how this money was appropriated.

2. That the paper offered by the plaintiff shows deposits made by the defendant of several thousand dollars, and that there is a much larger aggregate of money in the hands of the bank, as shown by the evidence, than would be needed for the payment of these notes; and the presumption of law is that the bank paid the notes out of the money in its hands.

Ans. This point we refuse.

3. There being no evidence of the protest of either of these notes, the presumption of law is that they were paid at maturity.

Ans. This point is refused.

The court, BAER, P. J., charged the jury as follows:

The plaintiff claims in this case to recover on two notes executed by the defendant, and which are not disputed. The plaintiff is entitled to a verdict at your hands for the full amount

of these notes with interest to this date, unless the defendant has satisfied you by proof that he had paid these notes. The defendant sets up payment by his pleadings; and he presents a check indorsed by him, for $1,034, which was presented to the bank; and he claims that the bank received it in payment of these two notes. As this check exceeds the sum of the notes, the defense would be complete, if in point of fact the bank received the check in payment of these notes. That is the question in this case: whether the bank received that check in payment of the notes, not whether the bank received it, because that is undisputed; but did it receive it in payment of these two notes?

[The plaintiff placed upon the stand the cashier of the bank, who is a competent witness, and he testified that the notes were not paid by this check, but that of this check $134 was paid in cash to Jacob Lingenfelter, the party presenting it, and that $900, at the request of Lingenfelter, went, not to pay the notes, but as credit upon an account against Lingenfelter on the books of the bank.]

Mr. Gardner was put upon the stand, and he said that Lingenfelter presented at the bank a list of credits which he alleged he was entitled to on his account; and that among these was that check of $1,034. This is the evidence substantially; if there is any other, you will bear it in mind and consider it.

[If the check was not paid on the notes, but put there and a credit claimed for it on his account, or for so much of it as was necessary to pay that account, then, under the pleadings and the evidence in this case, the verdict should be for the plaintiff for the amount of the two notes with interest up to this time.]

Verdict and judgment for plaintiff for $973.56.

The assignments of error specified the answers to plaintiff's and defendant's points, the portion of the charge inclosed in brackets, the action of the court in refusing a continuance to defendant and in admitting the evidence above noted.

Alexander King and *John H. Jordan,* for plaintiff in error.—Our amended pleas were: payment, and payment with leave to give the special matter set forth in the plea. This was in fact a set-off on our part; we offered the Lippel check for $1,034, against the notes. But, because we had not added "set-off" to our pleas, the court held the plaintiff could produce its book

account as a set-off against our checks, and admitted evidence on the part of plaintiff to this effect. This was certainly wrong, because, as we had pleaded payment and specified, the short plea was not necessary. Balsbaugh v. Frazer, 19 Pa. 95; Henderson v. Lewis, 9 Serg. & R. 379, 11 Am. Dec. 733; Calvin v. M'Clure, 17 Serg. & R. 385; Moloney v. Davis, 48 Pa. 512.

If the court misled the jury by directing attention to a point on which there was no evidence, it is error. Washington Mut. F. Ins. Co. v. Rosenberger, 3 W. N. C. 16; Snyder v. Wilt, 15 Pa. 59; Byles v. Hazlett, 11 W. N. C. 212; Burke v. Maxwell, 81 Pa. 139; Snyder v. Snyder, 6 Binn. 499, 6 Am. Dec. 493; Deal v. McCormick, 3 Serg. & R. 347; Hersheaur v. Hocker, 9 Watts, 455; Harrisburg Bank v. Forster, 8 Watts, 304.

A judge has no right to say to a jury what inferences they should adopt from the evidence. Wenrich v. Heffner, 38 Pa. 207; Parker v. Donaldson, 6 Watts & S. 132.

John Cessna and *Russell & Longenecker* for defendant in error.

PER CURIAM.

The refusal of the court to grant a continuance is not assignable as error. A clear difference exists between withdrawing a portion of the plaintiff's claim and adding to it, on the eve of the trial. The addition might require evidence with which the defendants are not prepared, and they may therefore be surprised. Not so the withdrawal of a part of the claim, so that the defendants will require less evidence to defend against it.

Whether the notes were paid was a question of fact. That there was evidence tending to prove they were not paid cannot be doubted. It, therefore, became a question of fact for the jury, to which it was well submitted. No assignment of error is sustained.

Judgment affirmed.

James McAlarney et Ux., Plffs. in Err., *v.* Charles M. Conyngham and L. C. Paine, Partners, Doing Business as Conyngham & Paine.

A married woman may, by mortgage duly executed and acknowledged, pledge her real estate for a debt of her husband.

NOTE.—For the power of a married woman to execute a mortgage upon her separate estate, see note to Vandyke v. Wells, 2 Sad. Rep. 126.

Such a mortgage (although originally obtained by misrepresentation and fraud, or incapable of enforcement for failure of consideration or alteration of terms of payment of the husband's indebtedness) may be renewed and validated by subsequent agreement in writing between the mortgagor and mortgagee.

Where a deed is presented to a man to sign it is his duty to read it if he can read, and, if he cannot, to ask to have it read and explained to him; and if he does neither, he is guilty of negligence, and the court will not relieve him.

The certificate of acknowledgment of a married woman's mortgage of her separate estate is conclusive evidence of the truth of all the facts therein set forth, and can only be overthrown upon proof that she was acting under duress or fraud.

(Argued May 12, 1887. Decided May 23, 1887.)

January Term, 1887, No. 348, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Columbia County to review a judgment on a verdict for the plaintiffs in an action of scire facias sur mortgage. Affirmed.

The facts as they appeared at the trial in the court below are stated in the charge to the jury, the material portions of which were as follows:

It appears that, in February, 1877, a mortgage was executed by James McAlarney and his wife, Mary McAlarney, to the firm of Conyngham & Paine, conditioned for the payment of the sum of $10,000, which, the mortgage recites, was secured by their bond. It appears that this mortgage was upon the property of the wife, and that the debt thus secured was not her debt but the debt of her husband.

According to the plaintiffs' allegation, this mortgage was given to secure first the debt of McAlarney, then in existence, amounting to some $4,000 or $5,000, and also to secure the firm of Conyngham & Paine for future credits to be given to McAlarney. It would appear from the testimony that at this time, McAlarney was somewhat embarrassed, and that the plaintiffs had refused to give him further credit, unless further security should be given; and, according to the plaintiff's allegation, this mortgage was given to secure future purchases of merchandise by McAlarney.

In addition to that it appears that in February, 1878, the year after the mortgage was executed, another paper was drawn and executed and acknowledged, containing certain recitals with regard to the original mortgage and providing further that this mortgage should extend as a security for a further advance to be paid by the firm of Conyngham & Paine, amounting to some $1,260, this advance to be made for the purpose of paying interest due to Mrs. Emley and to Mrs. Rutter, upon mortgages which they held against McAlarney. To this claim of the plaintiffs the defendants have set up in reality three defenses.

First, that Mrs. McAlarney was simply a surety for her husband, and that by reason of the arrangement which the plaintiffs allege was made between them and Mr. McAlarney the terms of the contract upon which she became surety were changed; and that by reason of that change in the terms of the contract she became discharged from her liability. This is based upon the fact that, at or about the time that the mortgage was executed, Paine gave to McAlarney a new paper setting forth the purposes for which the mortgage was given and the conditions upon which it would be satisfied. This has been referred to as "the explanatory paper." Across the face of it is an indorsement or writing changing the terms and conditions of that paper itself so as to increase the liabilities for which the mortgage was to be given and held from $6,000 to $10,000. While it is alleged by the plaintiffs that this paper was given to McAlarney, that is totally denied by McAlarney himself.

Second, that the agreement between Paine and McAlarney was not merely that future credits for the sale of merchandise should be given by Conyngham & Paine to McAlarney, but that these credits for his purchases from them should be extended only so far as to make up with the debt which he then owed to them the sum of $5,000, and that the rest of the debt secured by the mortgage, namely, $5,000 more, was to be for cash to be advanced to McAlarney by Conyngham & Paine; and it is alleged by the defendants, and not denied upon the part of the plaintiffs, that this advance was never made, that this $5,000 in cash was never paid by Conyngham & Paine to McAlarney. With regard to this second defense there is a conflict in the testimony, the plaintiff, Paine, testifying that this mortgage was given to secure solely in the first instance, debt incurred and to be incurred upon merchandise sold to the defendant, and de-

fendant, McAlarney, testifying that the agreement was that the mortgage should secure also a future advance of $5,000 in cash.

Third, that even if the plaintiffs' allegation be true, namely, that the agreement between Paine and McAlarney was that the mortgage should stand as security only for debt incurred upon the merchandise account between them for sales either past or future, yet Mrs. McAlarney did not give the mortgage for that purpose or with that understanding, but that she gave it for another purpose, or that she was induced by fraud and misrepresentation into signing the mortgage, the allegation upon the part of the defense being that she was told by her husband that the mortgage was to be given for the purpose of securing a loan of $5,000 in cash to him, in order that he might be able to meet his then pressing liabilities.

A year after the mortgage was executed, and some time after the future credits had been given to the defendant, and after, according to the defendant's allegation, the plaintiffs had refused to advance the $5,000 in cash, an agreement was entered into between the defendants and the plaintiffs, dated January 4, 1878, and acknowledged February 6, 1878. This agreement was executed by the defendants, and on its face was duly acknowledged before a justice of the peace. This agreement recites as follows:

"*Whereas,* The said James McAlarney and Mary, his wife, have jointly given a mortgage on certain lands situate in the County of Columbia, the said mortgage being given to the said Conyngham & Paine to secure to them a certain debt due them from the said McAlarney and also to secure them, the said Coyngham & Paine, for all advances, accounts, credits and debts incurred by the said McAlarney, due or to become due before the maturity of the said mortgage, and not exceeding in total amount the sum of $10,000." It provides for securing the advance which the plaintiffs were to make to pay the interest on the Rutter and the Emley mortgages, and says: "That the plaintiffs may and shall hold the mortgage of the above land, as executed to them on land in Columbia County, as well for the prompt and first (faithful?) repayment of the said (debts, etc.) as for $1,226.34, with interest on the same at the rate of 10 per cent per annum from the date hereof, as for the debt or debts already secured by said mortgage; it being understood that the whole amount so secured, together with the sum advanced as

above set forth, shall be accrued due and payable, as expressed in said indenture of mortgage, two years from the date thereof."

In order to prevent a verdict against them defendants must satisfy you, not only that the original mortgage was obtained from Mrs. McAlarney by fraud and misrepresentation, or that it was given for a different purpose than that which the plaintiffs claim, but also that the agreement of February 6, 1878, was obtained from her by fraud and misrepresentation. Even though the original mortgage might have been invalid as against her, on account of the agreement alleged to have been made between the plaintiffs and her husband without her consent, yet this would operate as a renewal of the said mortgage, re-establishing it as a valid security against her; in short, then, unless the evidence would warrant the conclusion that she was induced by fraud or misrepresentation to execute that paper, the plaintiffs would be entitled to recover.

The paper is attacked upon two grounds:

First, that at about the time it was executed, some arrangement was entered into between McAlarney and Paine that the latter should buy the Plymouth property at sheriff's sale, and hold it until McAlarney could redeem it. This written instrument contains no such agreement; and there is not sufficient evidence in this case to warrant the reformation of this agreement, or to warrant a conclusion by the jury that it did not contain the full agreement between these parties.

[In the second place it is alleged that there was misrepresentation as to the contents of this supplementary paper, McAlarney testifying that he did not read it, and in fact that he did not understand it as it appears to be. So far as he is concerned, he would be estopped from denying the validity of the instrument; it is plain and unambiguous upon its face; he had the full opportunity to read and examine it; he was able to read it; and the law is that where a deed is presented to a man to sign, it is his duty to read it if he can, and, if he cannot, to ask to have it read and explained to him; and if he does not do this, he is guilty of supine negligence, and the courts will not relieve him; so that we repeat, so far as McAlarney is concerned, he is estopped from alleging that he did not know, or that the supplementary paper was obtained from him by fraud or misrepresentation.]

Was it fraud upon Mrs. McAlarney? [An act of assembly

has provided a method by which, and by which alone, a married woman can convey her separate estate; it is by a written instrument acknowledging before a justice of the peace; she must be examined by the justice, in the absence of her husband; she must there declare that she executes the instrument without any fear or coercion or compulsion of her husband, and the certificate of the magistrate must set forth that the contents were fully made known to her by him. Where a married woman thus executes a deed for the conveyance of her separate estate, and the certificate of the fact is annexed, that certificate is conclusive evidence of the truth of all the facts therein alleged, and can only be overthrown by proof that she was acting under duress or fraud. The effect of this certificate cannot be avoided but by the clearest and most satisfactory evidence; it is not enough that the married woman testifies that she did not know what were the contents of the paper, for the paper was before her and she had an opportunity to read it or did read it. It would appear certainly from the testimony in the case, all that relates to this point, that no inducements or representations were held out to Mrs. McAlarney by the plaintiffs; there were no negotiations of any kind directly between them and her; they reside in Wilkesbarre, and the defendants reside in Plymouth. While the supplementary paper would seem to have been drawn in Wilkesbarre, it was executed and acknowledged in Plymouth before a justice of the defendants' own choosing; so that, so far as the evidence shows, there was no connivance or management by or upon the part of the plaintiffs, to induce the defendants to execute this paper. But the defendants' counsel argues that, under the testimony, McAlarney was the agent for the plaintiffs, and that therefore the plaintiffs are responsible for whatever representation he made to his wife; and here is the point at which the court and the counsel diverge. We cannot regard McAlarney, under the testimony in the cause, as the agent of the plaintiffs, in the sense in which the defendants' counsel puts it. McAlarney was the party to be benefited by the execution of this paper; it was for his interest; it was to secure his debt, an advance already made and another to be made to him.]

We can readily understand how or upon what principle a mortgagee ought to be held responsible for representations made by the husband, where the mortgagee employs the husband to obtain from his wife a mortgage on the wife's property to pay a debt of

some other person; but when, as in this case, the husband is the plaintiff's debtor or one applying to him for credit, and the plaintiff, who becomes the mortgagee, says to the husband: "If you will furnish me a mortgage on your wife's property, as security, I will give you this credit,"—we do not think that the creditor thereby makes the husband his agent, so as to make the acts and representations of the husband the acts and representations of the mortgagee. The misrepresentations or coercion of the husband may possibly avoid the deed, upon the ground that the facts as set forth in the certificate of acknowledgment are overcome, but not upon the ground that the husband was the agent of the mortgagee.

The evidence in the present case is not sufficient to overcome the proof, which the certificate of acknowledgment itself furnishes, that this mortgage was executed by the wife, and acknowledged by her in the absence of her husband, without any coercion from him, and after the facts that the instrument contains had been fully made known to her. The result of our conclusions is this: that the plaintiffs would be entitled to recover the amount of the debt which was due from McAlarney at the time the mortgage was executed and that they would also be entitled to recover the amount advanced by them to pay the interest on the Rutter and Emley mortgages, and that they would also be entitled to recover from the defendants whatever advances in money or goods were made after the execution of the mortgage, provided the agreement was as testified to by the plaintiffs; if, however, the agreement was as testified to by the defendants, we are of opinion that they would not be entitled to recover beyond the amount of the debt which was due at the time the mortgage was executed, unless you take it to be proved that at the time Mrs. McAlarney executed the second paper she knew that those things had been furnished by the plaintiffs upon the faith of this mortgage. If that fact had been by the testimony brought home to her, we think she would be held for that also; but we are inclined to think that the testimony is not sufficient to bring home to her the knowledge that these goods were furnished after the execution of the mortgage upon the faith of its security. As we understand, the plaintiffs, in order to relieve the cause of any further difficulty, propose to release any claim for anything due on any purchase made after the execution of the mortgage; and, therefore, under our instructions, your verdict will be for the

plaintiffs, for the amount of debt due at the time the mortgage was executed, and the amount of the advance to pay the Rutter and the Emley interests, with interest upon the sum of these up to the present day.

The counsel have presented certain written points which they request us to answer, and it is our duty to do so.

The defendants' counsel request us to charge:

1. That while a mortgage may be given by a married woman to secure her husband's indebtedness, it is only valid when given in good faith and without any deceit practised upon her, or misrepresentation, or undue influence. Such mortgage cannot be enforced if it be shown by the evidence that she was induced to execute the same by reason of any misrepresentation or deceit practised upon her.

Ans. This point, as a general proposition, is well worded and is affirmed.

2. That, where a wife joins her husband in a mortgage of her own property to secure his debts, or the payment of money loaned to him, she is a surety and entitled to all the rights of a surety. If therefore the jury find that subsequently to the execution and delivery of the mortgage in this case, a change was made by the plaintiffs, even with the assent of her husband, with regard to the indebtedness of James McAlarney which was secured by the mortgage, such change would operate to discharge Mary McAlarney, and the plaintiffs cannot recover against her.

Ans. We decline to charge as requested in this point, because it leaves out of view the effect of the supplementary agreement executed in February, 1878.

The third and fourth points are to be taken together: "That, where a party acts through an agent, especially commissioned to do the act, the statements and acts of the agent are imputable to the principal; and also, that where a party seeks to enforce a claim obtained from the misrepresentations of another, he cannot, on the one hand, thus seek to obtain the benefit of such misrepresentations and, on the other, repudiate them as not being his own nor binding upon him; therefore, in the present case, the plaintiffs being here endeavoring to enforce a mortgage obtained by them from Mary McAlarney, through her husband, James McAlarney, if the jury find that such mortgage was obtained from her by reason of statements and representations mislead-

ing her and amounting to deceit practised upon her, the plaintiffs cannot recover in this action."

Ans. We decline to charge as requested in this point, for the reason that this also leaves out of view the effect of the supplementary agreement of February 6, 1878, as curing any defect which might originally have existed in the mortgage. These two points are negatived.

5. That under all the evidence in the case, if the jury believe the testimony of Mary McAlarney, that she was induced to execute the mortgage in question in this case by the distinct representation that $5,000 in cash was to be furnished to her husband, in addition to a credit for a like amount, her testimony being corroborated as it is by the testimony of the justice who took her acknowledgment, and by that of her husband, then the plaintiffs cannot recover.

Ans. We decline to charge as requested in that point, for the reason already given.

The counsel for the plaintiffs have requested us to charge as follows:

1. That there is not sufficient evidence to impeach the validity or to change or alter the legal effect of the mortgage and the supplementary agreement produced in evidence by the plaintiffs.

Ans. If it were not for the second agreement, to which we have called your attention at length, we would say that there would be evidence to go to you as to the fairness of the execution of the mortgage, as to its validity; but, in view of all the testimony, we say, as requested in the point, that there is not sufficient evidence to impeach the validity or to change or alter the legal effect of the mortgage and the supplementary agreement.

A calculation has been made, and as there is no dispute as to these items, you will render your verdict for the amount ascertained to be now due, namely: $9,978.74.

Verdict and judgment for the plaintiffs for $9,978.74.

The assignments of error specified: (1) The answer to the plaintiffs' first point; (2) and (3) the portions of the charge inclosed in brackets; (4) the answer to the defendants' second point; (5) the answer to the defendant's third and fourth points; (6) the answer to defendant's fifth point; and (7) the action of the court in directing a verdict for the plaintiffs.

C. W. McAlarney and *A. Ricketts,* for plaintiffs in error.—The case of Cridge v. Hare, 98 Pa. 561, is decisive of the present. There Mrs. Cridge executed the mortgage under misrepresentations to her; and this fact was held to be a defense, although the mortgagee was not the party who made the misrepresentation, nor present when it was made, nor shown to have any connection with it. Michener v. Cavender, 38 Pa. 334, 80 Am. Dec. 486.

In addition to the misrepresentation in the present case it appears from the testimony of the justice that the acknowledgment of the wife was not separate and apart from her husband, as the law requires. That he was within hearing distinctly appears from the fact that when Mrs. McAlarney hesitated at the acknowledgment, he at once came back and repeated the representations and assurances which induced her to execute it. See McCandless v. Engle, 51 Pa. 309.

The subsequent paper signed and acknowledged by Mrs. McAlarney in this case did not cure these defects.

The present action is not an action of covenant on this agreement, but a scire facias on the mortgage. By the ruling of the learned judge we have the singular situation that the writ of scire facias on the mortgage may not be maintained on the mortgage itself, by reason of its invalidity; but it may be maintained because there is a subsequent "agreement" which is valid.

The statute confers no power upon a married woman to make contracts, or to bind or dispose of her lands, except in the precise statutory mode. Glidden v. Strupler, 52 Pa. 400; Graham v. Long, 65 Pa. 383; Brown v. Bennett, 75 Pa. 420.

This "supplementary agreement," as the court styles it, cannot operate as a waiver, confirmation or ratification. The disability of the married woman continued, and therefore such cases as Brown v. Bennett, 75 Pa. 420, which rules that after the disability is removed she may ratify a contract made during coverture, have no applicability.

There was no new consideration; and the mere confirmation of a void matter, even by deed, is of no avail. Co. Litt. 295, b; Gilbert, Tenures, 74, 75.

There is no evidence that Mrs. McAlarney knew the facts with regard to the invalidity of the mortgage, and that she intended to waive her rights in the matter; and this was positively essential to make the agreement operate as a confirmation or ratifica-

tion of the mortgage or a waiver of her defenses against the same. Therefore her agreement could not be held to be a confirmation of the mortgage. Bank of Pennsylvania's Estate, 60 Pa. 471, 479; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427; Harmer v. Killing, 5 Esp. 102; Curtin v. Patton, 11 Serg. & R. 305; Hinely v. Margaritz, 3 Pa. 428.

A mortgagee in this state is not a purchaser, but a lien creditor simply; and the plea of bona fide purchase for value does not apply to him as to a purchaser. Rickert v. Madeira, 1 Rawle, 325; Scott v. Sample, 5 Watts, 53; Wilson v. Shoenberger, 31 Pa. 295.

But whatever their rights might be as to any other matter, the plea of bona fide purchase for value, without notice, could not be set up by these parties as to this supplementary agreement.

In Schuylkill County v. Copley, 67 Pa. 386, 5 Am. Rep. 441, it was ruled that where an illiterate person is induced to execute a deed upon a misrepresentation of its contents it is not his deed at all.

If husband and wife execute a deed for her property, relying upon certain misrepresentations, the deed is void notwithstanding the fact that a money consideration was paid. Levick v. Brotherline, 74 Pa. 149; Lippincott v. Whitman, 83 Pa. 244.

In Williams v. Baker, 71 Pa. 476, 483, upon a question of ratification by a married woman after she became of age, of a conveyance made while she was a minor, this court says: "The court would have been justified in withdrawing the question from the jury and instructing them in conformity with the doctrine in Glidden v. Strupler, 52 Pa. 400, that she could not ratify the conveyance otherwise than by a re-acknowledgment of the deed in the mode prescribed by the statute."

Paine and McAlarney had made a change as to the indebtedness upon which the mortgage was taken as security, and therefore Mrs. McAlarney was discharged, she being merely a surety and entitled to all the rights and privileges of a surety. Schouler, Dom. Rel. 155; 2 Bishop, Married Women, § 370; Neff v. Horner, 63 Pa. 327, 3 Am. Rep. 555; Fulmer v. Seitz, 68 Pa. 237, 8 Am. Rep. 172; Caley v. Philadelphia & C. County R. Co. 80 Pa. 363; Brez v. Warner, 9 W. N. C. 45; Bacon v. Chesney, 1 Starkie, 192; Glyn v. Hertel, 8 Taunt. 208; Campbell v. French, 6 T. R. 200.

He acts fraudulently who secretly changes a state of affairs,

and then procures another to do an act into which the true state of affairs enters as a motive. Lancaster County Bank v. Albright, 21 Pa. 228.

Where inquiry becomes a duty, the party who neglects to perform it should be visited with at least constructive notice of the facts that probably would have been brought to light if it had been duly made. Leonard's Appeal, 94 Pa. 168; Hottenstein v. Lerch, 12 W. N. C. 4.

H. W. Palmer and *Alexander Farnham,* for defendants in error.—Had the proof of the agreement of the parties, as to what indebtedness was to be secured, rested in parol, the evidence of the defendants might have been admissible under the authority of Cridge v. Hare, 98 Pa. 561; but the supplementary agreement was in evidence. Its execution was admitted. It was offered as showing the written admission of the parties that the mortgage was given by them as security for the matters of indebtedness therein stated; and, therefore, so long as it stands unimpeached the defendants are incompetent to testify that the additional $5,000 was to be advanced in money, as such evidence, parol in its nature, goes to change, alter and affect the written instrument which they executed and acknowledged.

The testimony of Mr. and Mrs. McAlarney, uncorroborated as it is, is not sufficient to overcome the effect of a solemn instrument of writing, executed and acknowledged by them.

The right method of determining this question would be by supposing that the defendants had instituted their proceedings in equity towards having the agreement reformed so as to read in accordance with their allegations.

Since the scintilla doctrine has been exploded the preliminary question of law for the court is, not whether there is literally no evidence, or a mere scintilla, but whether there is any that ought reasonably to satisfy a jury that the fact sought to be proved is established. Hyatt v. Johnston, 91 Pa. 200.

Under our peculiar system of administering equitable principles in common-law actions, the judge presiding at the trial performs the functions of a chancellor. As a judge, he ought not to permit a jury to do what he, as a chancellor, would not sanction. Rowand v. Finney, 96 Pa. 192.

Tested by this rule there is nothing in the evidence on the part of the defendants which would have justified the court in sub-

mitting to the jury the question whether Mrs. McAlarney's execution of the supplementary agreement had been obtained by misrepresentation or fraud.

It is only where a chancellor would reform the instrument that parol evidence is admissible to contradict it. Phillips v. Meily, 106 Pa. 536.

With only the unsupported oath of one of the parties to the instrument on the one side, and the opposing and contradictory oath of the other party, together with the words of the instrument, on the other side, such unsupported oath is not sufficient to justify the reformation of the instrument; and in such case the evidence should not be submitted to the jury. Jackson v. Payne, 114 Pa. 67, 6 Atl. 340.

The evidence of both McAlarney and his wife is the evidence of but one witness. They constitute together but one witness. Sower v. Weaver, 78 Pa. 444.

The fact that the person alleged to be present, and who attested the execution of the instrument, was not called by the defendants to testify on the subject, notwithstanding he was examined concerning the execution of the mortgage, contradicts them. Thomas v. Loose, 114 Pa. 35, 6 Atl. 326; Juniata Bldg. & L. Assó. v. Hetzel, 103 Pa. 507.

Mrs. McAlarney, by her own admission, was able to read writing. If a party who can read will not read a deed put before him for execution, or if, being unable to read, he will not demand to have it read or explained to him, he is guilty of supine negligence, which is not the subject of protection, either in equity or at law. Greenfield's Estate, 14 Pa. 496; Pennsylvania R. Co. v. Shay, 82 Pa. 198.

There was, therefore, no fraud upon Mrs. McAlarney; and parol evidence to contradict the writing is inadmissible. Martin v. Berens, 67 Pa. 460.

The magistrate who took her acknowledgment certifies that she acknowledged it privately—separate from her husband, and that he first made the contents of the instrument fully known to her. No attack is made upon this certificate.

It is true that in a number of cases parol evidence has been admitted to overthrow the certificate; but, in all these cases, gross fraud and imposition had been practised, affecting the acknowledgment itself. Heeter v. Glasgow, 79 Pa. 79, 21 Am. Rep. 46; Oppenheimer v. Wright, 106 Pa. 569.

PER CURIAM:

An examination of the evidence, and a due consideration of the argument of the counsel for the plaintiffs in error, fail to satisfy us that the learned judge committed any error.

We concur with him in declaring that all the evidence is not sufficient to impeach the validity, or to change or alter the legal effect, of the mortgage and the supplementary agreement which became a part thereof. There is no error in the answers to the points under the evidence.

Judgment affirmed.

Maggie G. Wise et al. Admrs. of Henry Wise, Deceased, Plffs. in Err., *v.* Joseph C. Walker.

An action by the administrator of an equitable vendee of land against the vendor, for the recovery of the purchase money (the heirs of the vendee not being parties to the action), cannot be maintained without proof that the interest of the heirs has been legally devested.

(Argued May 17, 1887. Decided May 30, 1887.)

January Term, 1887, No. 259, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Error to the Common Pleas of Lancaster County to review a judgment on a verdict for the defendant in an action of assumpsit. Affirmed.

At the trial before PATTERSON, J., the following facts appeared:

On October 8, 1884, Joseph C. Walker and Henry Wise entered into articles of agreement under seal, for the sale and purchase of a farm in Sadsbury township, containing 122 acres and 31 perches. Walker covenanted and agreed that he would, on or before April 1, 1885, at the cost of Wise, "his heirs and assigns, by such deeds of conveyance as he or they, or his or their counsel, learned in the law, shall advise, well and sufficiently grant, convey, and assure unto the said Henry Wise, his heirs

NOTE.—Formerly equitable interests in land seem to have passed to the executor or administrator as personal property. Campbell v. Rheim, 2 Yeates, 123. But the rule now is that such are chargeable only with personal property or the proceeds of a sale of real estate. Dundas's Estate, 18 Phila. 79. This is also true of growing crops, which pass to the heirs. McDowell v. Addams, 45 Pa. 430.

and assigns, in fee simple, clear of all encumbrances," the said farm. In consideration whereof, Wise, for himself, his heirs, executors, and administrators, covenanted and agreed that he would pay or cause to be paid to Walker, his heirs, executors, administrators, or assigns, "the sum of $100 per acre; total $12,219.37½, to be paid as follows: $1,219.37½ to be paid on the signing and sealing the articles of agreement, the balance of $11,000 to be paid on or before the 1st day of April, 1885, on the delivery of a properly prepared and signed deed of conveyance,"—Walker to allow $5,000 or $6,000 to remain secured on the property at 5 per cent per annum. The $1,219.37½ was paid to said Walker as agreed upon.

The property was then in the possession of one Glick, as tenant of Walker.

On March 12, 1885, Wise died, leaving a widow and five children, all minors except Thomas G. Wise, who with his mother became administrators of the decedent, by letters granted March 25, 1885.

On April 1, 1885, Walker, accompanied by Benjamin Ellmaker, called on Mrs. Wise at her house, and in the presence of some of the children and a friend tendered her a deed, drawn under his directions, in which "the heirs" (without naming them) of Henry Wise were made grantees. Mrs. Wise expressed some doubts as to the validity of the deed drawn up in the form it was, at the same time expressing her entire willingness to complete the purchase, including the payment of the purchase money as provided in the articles of agreement. She asked, however, sufficient time to go to Lancaster, a distance of about 20 miles, to consult counsel, and return by the 7:30 train that evening. This permission was refused by Walker, and he at the same time said that they could appoint guardians over the minor children, that the deed so tendered should be then accepted or never, and that on refusal he would take possession of the property that evening, which he did.

The property had been provisionally leased by Mrs. Wise to Glick, whose term was to commence April 1, 1885. When Mrs. Wise found that Walker was both obstinate and unreasonable, she offered to take and pay for the property herself, upon Walker signing and delivering a sufficient deed to her as grantee. This offer too Walker refused, and left, taking the deed with him. Things remained in this condition until some time in the

month of May, then following, when Walker again made his appearance, and tendered the same deed. Mrs. Wise and the family, after what occurred on April 1, believed that Walker had abandoned the written agreement, and considered that the agreement was rescinded. They, therefore, refused the conveyance. On Walker's refusing to refund the $1,219.37½, which had been paid on it by Wise in his lifetime, the administrators brought this action of assumpsit on the common counts to recover it.

On the trial in the court below the plaintiffs offered to prove by a witness the fact that Glick was in the possession of the property mentioned in the agreement after the first of April, as the tenant of Mr. Walker. Rejected and exception. First assignment of error.

The plaintiffs also offered in evidence the record of a mortgage held by Samuel W. Evans against Joseph C. Walker, mortgaging the property mentioned in the agreement for $8,000, which mortgage remained open on the first of April, 1885. Rejected and exception. Second assignment of error.

The court entered a nonsuit. Third assignment of error.

And subsequently refused to take it off. Fourth assignment of error.

B. F. Davis and *Wm. R. Wilson,* for plaintiffs in error.—The true construction of the agreement is that while the deed shall be paid for by Wise, the purchaser, the duty of preparing it and submitting it to purchaser and his or her counsel, if required, before or at the time of tender, rested with Walker, the seller. M'Sherry v. Askew, 1 Yeates, 79; Sweitzer v. Hummel, 3 Serg. & R. 228; Callaghan v. McCredy, 48 Pa. 463; Gans v. Renshaw, 2 Pa. St. 34, 44 Am. Dec. 152. See also Cro. Eliz. 716.

The party first desiring to enforce performance is bound to regard his part of the contract as a condition precedent, and perform or tender performance. Irvin v. Bleakley, 67 Pa. 24.

That the defendant himself knew that he had to prepare a proper deed, signed and tendered, is shown by his own acts as far as they went. He had to do this, before he could ask for the purchase money. Mervin v. M'Fadden, 2 Watts, 132.

A purchaser of land is not bound to accept any deed. He is not bound to accept a deed in which there is a blank left for the consideration money, although the grantors, after the acknowl-

edgment of the deed, authorize their agent to fill up the blank (Moore v. Bickham, 4 Binn. 1); nor is he bound to accept a deed with an erasure. Markley v. Swartzlander, 8 Watts & S. 172.

The plaintiffs in this case had an undoubted right not merely to a good, but an indubitable title; such a title as is marketable. Swayne v. Lyon, 67 Pa. 436; Gans v. Renshaw, 2 Pa. St. 36, 37, 44 Am. Dec. 152.

A deed to the heirs of Henry Wise, without naming individuals, is void for uncertainty. Morris v. Stephens, 46 Pa. 200.

A vendee of land is not bound immediately to accept or refuse to accept a deed tendered to him; he may demand a reasonable time to examine it, or submit it to his counsel. And if a vendee refuses to accept a deed tendered to him for reasons well or ill founded, or without assigning any reason, he is not thereby deprived of the *locus pœnitentiæ* but may afterwards demand his deed. Wilson v. M'Neal, 10 Watts, 422.

Under the most stringent and literal construction of the words in the agreement by which Walker bound himself to convey to the said Wise, "his heirs and assigns," and the words by which Wise bound himself, "his heirs, executors, and administrators, or some of them," to pay the purchase money as therein provided, by the offer of the widow to step in, even without asking time to consult counsel, to take the deed in her own name and pay the purchase money right then, on the 1st of April, 1885, whether she be considered in the light of an heir in the estate of her husband or as administratrix, which latter she certainly was at that time, the plaintiffs complied with the very letter of their covenants; and it is equally plain that when the defendant, Walker, refused to make such a deed, he broke both the letter and the spirit of his undertaking under seal. The word "heirs" does not necessarily exclude the widow, "because that word has been held to mean such persons as would be entitled to the money, or the representatives by the law of the country." Gibbons v. Fairlamb, 26 Pa. 217; Patterson v. Hawthorn, 12 Serg. & R. 112; Buckley v. Reed, 15 Pa. 83.

Surely, after what occurred, the plaintiffs were justified in concluding that defendant meant not to convey the land; and from that time they had a right to consider the purchase and sale as rescinded and ask for a repayment of the money advanced on the faith of it.

Where a party to a contract by his acts or default renders the performance of the contract impossible, or if not wholly impossible, yet imposes such conditions upon its execution as to render its performance practically impossible, the other party may treat the same as rescinded. Seipel v. International Life Ins. & T. Co. 84 Pa. 47.

The plaintiffs being ready to comply with their part of the contract and the defendant not, they could rescind and recover back the money they had paid. Cleveland v. Sterrett, 70 Pa. 204.

They were in a position to rescind and recover back the money paid, without even tendering the balance of the money, which was only due on the completion of the contract. Crossgrove v. Himmelrich, 54 Pa. 203; Smethurst v. Woolston, 5 Watts & S. 106.

And this especially so, since Walker resumed the possession. American L. Ins. Co. v. McAden, 109 Pa. 399, 1 Atl. 256; Smethurst v. Woolston, 5 Watts & S. 109; Feay v. Decamp, 15 Serg. & R. 227.

We might concede for argument's sake that both parties were in default, and still this action on the common counts to recover back the money paid can be sustained. 1 Chitty, pl. *355.

There are cases where even the vendee was entirely in default; as, where he enters into a contract when grossly intoxicated, he is allowed to rescind the contract and recover back the money paid. Bush v. Breinig, 113 Pa. 310, 57 Am. Rep. 469, 6 Atl. 86.

Under no view will a court in equity allow a vendor to keep the land and retain the purchase money paid. Feay v. Decamp, 15 Serg. & R. 230.

The court at least should have left the question of rescission or abandonment of the contract to the jury. Grove v. Donaldson, 15 Pa. 128.

The court should have admitted the evidence that after April 1, 1885, Glick was the tenant of Walker and attorned to him, because such act was in direct disaffirmance of the contract and in affirmance of what the defendant said he would do if plaintiffs would not accept the defective deed tendered. Feay v. Decamp, 15 Serg. & R. 227.

The court erred in rejecting the record evidence going to

show that this property was encumbered on April 1, 1885, to a greater amount than the agreement provided might remain on the premises.

J. Hay Brown and *G. C. Kennedy,* for defendant in error.—The doctrine that where there is a scintilla of evidence it must be submitted to the jury is exploded. Howard Exp. Co. v. Wile, 64 Pa. 201.

If essential elements, indispensable to the plaintiff's right to recover, appear to be wanting in his case when he has given his evidence, the court commits no error in granting a nonsuit, either on motion or of its own accord. Irvin v. Bleakley, 67 Pa. 27.

Walker could not, after the death of Wise, have been called upon to perform his part of the contract by anybody except the heirs of Wise, acting for themselves or through their representatives. Neither could Walker tender performance to anybody excepting the heirs of Wise, nor demand the purchase money from any other person except the heirs or the administrators.

There is no evidence anywhere in the case that the heirs of Wise, or anybody representing them, have ever demanded of Walker a title to this property to this day, nor did the said heirs or anybody representing them or him ever tender performance of the covenants of the said articles of agreement. It is, therefore, clear that unless Walker voluntarily rescinded the contract the administrators are in default, can have no standing in this suit, and the nonsuit was properly entered by the court below.

The vendee must tender the unpaid purchase money as a general thing, whether he wishes to rescind or enforce the contract. This results from the principle that a party himself in default has no right to insist on rescission while he is in default. Irvin v. Bleakley, 67 Pa. 25.

In Hathaway v. Hoge, 1 Sad. Rep. 119, this court said: "The vendor of the land was ready and willing at all times to convey a good title, according to the terms of his contract. After the vendee had made several payments according to his agreement, he put it out of his power to fulfil the residue of his contract. His payments were voluntary. He then cannot rescind the contract and recover the sum which he had thus paid to the vendor. It matters not that the vendor might not have been compelled to perform his agreement, it is sufficient that he was ready and will-

ing to do so." See also Murray v. Ellis, 112 Pa. 485, 3 Atl. 845; Adams v. Williams, 2 Watts & S. 227.

There was no error in the refusal by the court to admit evidence of a mortgage standing against the property. Walker was not bound to remove it unless he was put upon doing so by the demands of the plaintiffs of performance and at the same time showing a readiness and willingness on their part to comply with their covenants. Irvin v. Bleakley, 67 Pa. 25; Hampton v. Speckenagle, 9 Serg. & R. 212, 11 Am. Dec. 704.

The question of rescission is the only point which could by any possibility be deemed to be sufficient to carry this case to the jury.

An action to recover purchase money on articles of agreement is in the nature of a bill for specific performance. Murray v. Ellis, 112 Pa. 485, 3 Atl. 845.

A decree of specific performance is of grace, not of right; and is awarded only to the purchaser who is eager, prompt and ready to perform. Washabaugh v. Stauffer, 81* Pa. 502.

PER CURIAM:

This suit was brought by the administrators of the equitable vendee, against the vendor. The heirs of the vendee are not a party to this action, and their interest in the land is not shown to have been legally devested by any evidence before us. It follows that there was no error in rejecting the evidence offered, and in ordering the nonsuit, and in refusing to take it off.

Judgment affirmed.

Benjamin B. Myers, Plff. in Err., *v.* Benjamin Fritz.

Although one who, by a dam erected on his own land, accumulates water is liable to others for injury to their property resulting from the breaking of the dam in such a storm as might have been expected, yet if the injury proceeds from an extraordinary storm or rain or other act of God, such as could not have been foreseen, he is not liable for it.

(Argued May 19, 1887. Decided May 30, 1887.)

NOTE.—Such constructions as dams or culverts must be erected and adapted to prevent injury under ordinary conditions. Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401; Fick v. Pennsylvania R. Co. 157 Pa. 622, 27 Atl. 783. But the constructors are not bound to provide against extraordi-

January Term, 1887, No. 295, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Lancaster County to review a judgment on a verdict for the defendant in an action for damages caused by the breaking of a dam. Affirmed.

At the trial before PATTERSON, J., the following facts appeared:

Myers and Fritz owned and occupied adjoining farms. The Fritz farm was the higher land, and a narrow valley opened from it upon the Myers farm. Along the division line across this valley Fritz maintained, upon his own land, an embankment of earth and stones forming a dam about 6 feet high on the side next the Myers farm, and not so high on the upper side

In July, 1883, during a sudden storm, part of the dam was swept away by the water that accumulated behind it and poured over it The fields of Myers were flooded and washed into gullies. His crops and fences were injured and a great quantity of rubbish was deposited in his meadow. As to the violence of the storm the testimony varied.

The court charged the jury as follows:

This is an action on the case brought by Benjamin Myers, the plaintiff, to recover damages consequential, or resulting from the building of a row or pile of stones by defendant upon his own land. In the language of the narr., as the plaintiff complains, "by means of divers large quantities of stones, wood, clay, and other materials, erected an embankment or dam on his said tract of land (of the defendant's land), at or near the line between the said tract of the said defendant, and the said tract of the plaintiff, by means of which embankment or dam the natural flow of the drainage and surface waters was stopped and obstructed, until a large body of water was collected into a pool,

nary floods. Baltimore & O. R. Co. v. Sulphur Springs Independent School Dist. 96 Pa. 65, 42 Am. Rep. 529; Pittsburg, Ft. W. & C. R. Co. v. Gilleland, 56 Pa. 445, 94 Am. Dec. 98. If there is conflict in the testimony as to whether the flood was extraordinary the question is for the jury. Fick v. Pennsylvania R. Co. 157 Pa. 622, 27 Atl. 783; Brown v. Pine Creek R. Co. 183 Pa. 38, 38 Atl. 401. As to what constitutes an extraordinary flood, see Farnham, Waters, p. 1840. As to liability of landowner for constructing a wall on his land without providing against extraordinary floods, see the same author, at p. 1839.

and the said water so collected, by its weight and force, broke the said embankment or dam, and washed the stones, wood, clay, and other materials of the said embankment or dam upon the said land of the plaintiff, thereby covering the grass, pasture, and grain growing on said land, and encumbering the said land with rubbish in many places; and at other places the force of the current, after breaking the said embankment or dam, washed away the soil of the said tract of land, and made large gutters or gullies therein, whereby the said tract of land of the plaintiff was greatly deteriorated and lessened in value, and a large portion thereof was rendered entirely useless. By means of which said several premises, the plaintiff hath been greatly injured in the use and possession of his said tract of land. Whereupon he, the plaintiff, saith he is injured and hath sustained damage to the amount of $2,000; and therefore he brings this suit.

[This is what is charged against the defendant by the plaintiff, and this suit is brought by the owner of the land or tract that is alleged to have been injured. The testimony shows that he was the occupier and owner also at the time this storm happened. He therefore cannot recover damages, if any, for use, and also for a permanent injury. His damages, if he be entitled to any, can only be for a permanent injury.][1]

We also say to you that if you are satisfied that the owner, Mr. Myers, was the owner and possessor, at the time of the alleged injury, namely, in July and August, 1883, and that the trespass was completed then, and the testimony only directs us to that particular time, then the owner of the land is not devested of this action by a subsequent sale; he did not lose his right of action by a subsequent sale. Although he did sell subsequently to Mr. Eshleman, that does not prevent him from maintaining this suit.

A man may build a wall or other erection on his own property, provided by so doing he does not injure his adjoining owner.

In this case the parties both admit that the row of stones or dam, caused by those stones thrown into the natural drain, and the heavy rain accumulating the water there, caused the breaking thereof; and both admit that such breaking was the immediate cause of the injury to the plaintiff's land.

The law of this case the court submits to the jury as follows: [If the injury to the plaintiff Myers was caused by the defendant's dam or embankment of stones breaking by reason of a

storm under ordinary circumstances such as he might have anticipated or expected when he made it, and he was keeping it up, he would be liable in this action.][2] But if the injury proceeded from an extraordinary storm or rain or an act of Providence such as could not have been foreseen or anticipated or expected, the plaintiff would not be entitled to recover. In other words, the defendant here would be liable for all damages from the ordinary recurring and expected floods or rains of the season, but not for those occasioned by uncommon, unexpected and unusual floods or rains.

And this is a question for your determination under the evidence—under all the evidence submitted to you from the witness stand. You will look at all the evidence submitted to you: when this stone pile or dam was begun—how made or constructed—it was not disputed that the defendant contributed to build it up—and consider whether any damage had ever resulted from this dam or erection or not, before the alleged damage occurred.

In general, the rule for the measure of damages in cases of this kind,—and if you find and believe that the defendant is liable here,—the measure of damages is actual compensation for the injury—whatever would compensate the plaintiff for the injury, no more. That you are to find from the evidence. The damages for inadvertent or unintentional injuries, unaccompanied with violence, are simply compensatory; and that would be the damages in this case, should you find under the law and the evidence that the plaintiff is entitled to damages at all.

Should you find and believe that the defendant was grossly negligent, or maliciously built up these stones to injure the plaintiff—if you so find, then the amount of damages rests in the sound discretion of you, the jury—rests with you, uninfluenced by prejudice or passion.

The plaintiff submitted, *inter alia,* the following points:

1. Every man has the right to use his own property as he pleases, provided such use does not injure his neighbor, and whenever he does injure his neighbor by such use, he is responsible to the latter for damages.

Ans. Yes, if by such use of his property he might have foreseen that his neighbor would be injured, he would be responsible to the latter for damages.

3. If the jury believe that the defendant erected a dam or embankment on his land near the line of the land of plaintiff, and thereby dammed the water which naturally ran from his land to that of the plaintiff, so that it collected into a pool, which by its weight and force broke the dam or embankment, and rushed down upon the land of plaintiff, and injured the same, their verdict must be for the plaintiff for such sum as will compensate him for the loss and injury which he sustained thereby.

Ans. We affirm this point, with the qualification that if the jury believe that defendant erected a dam or embankment on his land near the line of the land of the plaintiff, and thereby dammed the water which naturally ran from his land to that of the plaintiff, under ordinary circumstances, such as he might have anticipated when he erected it, or hauled the stones into the natural drain, he would be liable for the loss and injury which the plaintiff sustained thereby.

The defendant submitted, *inter alia,* the following point:

1. If the jury believe that the damage complained of was caused by an extraordinary rain fall, such as is unusual and not to be expected in ordinary seasons, then it was the act of God, and the defendant is entitled to their verdict, even if they believe that the washing out of the stone pile on the defendant's land was the immediate cause of it.

Ans. Yes. If the jury find that the washing out of the stone pile was the immediate cause of the injury, and occasioned by an uncommon, unexpected and extraordinary rain storm, occasioned by an act of Providence which could not have been anticipated, the defendant would not be liable, and the defendant would be entitled to your verdict.

The assignments of error specified: (1) and (2) The portions of the charge inclosed in brackets; (3) the action of the court in keeping prominently before the jury the idea of a flood amounting to an act of God; (4), (5) and (6) the respective answers to the points quoted.

D. G. Eshleman, G. R. Eshleman, and *J. E. Snyder,* for plaintiff in error.—If the jury are directed to find whether an injury was caused by an act of Providence which could not have been anticipated, they ought to be particularly instructed as to what constitutes an act of Providence in the eye of the law.

It is not enough that the dam is sufficient to resist ordinary

floods; for if the stream is occasionally subject to great freshets, those must likewise be guarded against. Angell, Watercourses, § 336.

A person building a dam across a stream subject to extraordinary freshets is bound to construct it to resist such freshets, although they occur only once in several years, and at no regular intervals. Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61.

The owner of a dam erected on his own land is responsible for all injury done to that of his neighbor, arising from the ordinary and expected, and even extraordinary, freshets occurring in the stream. Humphrey v. Irvin, 3 Sad. Rep. 272; McCoy v. Danley, 20 Pa. 85, 57 Am. Dec. 680; Casebeer v. Mowry, 55 Pa. 419, 93 Am. Dec. 766.

S. H. Reynolds and *D. McMullen,* for defendant in error.—An action does not lie for a reasonable use of one's right, although it be to the injury of another. For the lawful use of his property a party is not answerable in damages, unless on proof of negligence. Philadelphia & R. R. Co. v. Yeiser, 8 Pa. 374.

The party erecting the structure must provide and guard against such accidents as may be reasonably anticipated, under all the circumstances. Gray v. Harris, 107 Mass. 492, 9 Am. Rep. 61; New York v. Bailey, 2 Denio, 433.

Every storm is, strictly speaking, the act of God; and for any injury done thereby no man is liable in damages unless he has by his own negligence (or in other words: by the want of that degree of care which the law requires of him under the circumstances) contributed to the injury. And the degree of care required is that which will guard against injuries which knowledge and experience of the surroundings should lead one to expect, anticipate, or foresee. Lehigh Bridge Co. v. Lehigh Coal & Nav. Co. 4 Rawle, 9, 26 Am. Dec. 111.

Where the injury arises from some cause out of the ordinary course, from some unusual cause—as, for instance, from a flood or freshet, such as has been described by the witnesses—the owner of the dam is not liable to damages. Bell v. M'Clintock, 9 Watts, 119, 34 Am. Dec. 507.

An act of Providence in legal phraseology means an accident against which ordinary skill and foresight is not expected to provide. It does not include those floods which happen so fre-

quently that men of ordinary prudence are expected to calculate upon them. McCoy v. Danley, 20 Pa. 89, 57 Am. Dec. 680.

The concurrence of negligence with the act of Providence, where the mischief is done by flood or storm, is necessary to fix the defendant with liability. Livezey v. Philadelphia, 64 Pa. 106, 3 Am. Rep. 578.

PER CURIAM:

We do not think any one of the specifications of error is sustained. The evidence of the magnitude of the storms was such that the counsel for the plaintiff concedes that it should have been submitted to the jury. It was submitted, in a clear and fair charge. In the absence of any more specific instructions being prayed for, we see no error in answers to the points, nor in the charge. It was not misleading or inadequate.

Judgment affirmed.

Delaware River & Lancaster Railroad Company, Plff. in Err., *v.* Samuel N. Rowland.

An action by a railroad company to recover unpaid subscriptions to its stock may be defeated by proof that the company has abandoned the construction of its line.

The question whether, under the evidence, the company has abandoned the construction is for the jury.

In this case *held* that the evidence was properly submitted.

(Argued May 20, 1887. Decided May 30, 1887.)

January Term, 1887, No. 132, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Error to the Common Pleas of Chester County to review a judgment on a verdict for the defendant in an action of assumpsit. Affirmed.

NOTE.—For the presumption of abandonment from a failure to call for a subscription for more than six years, see Pittsburgh & C. R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770; McCully v. Pittsburgh & C. R. Co. 32 Pa. 25. If there is a change in the location of the termini of the corporation's road as defined in its charter, the subscription is avoided (Manheim, P. & L. Turnp. Co. v. Arndt, 31 Pa. 317); or in its place of business (Auburn Bolt & Nut Works v. Shultz, 143 Pa. 256, 22 Atl. 904).

The facts as they appeared at the trial before FUTHEY, P. J., were stated in his charge to the jury, which was as follows:

This is an action brought by the Delaware River & Lancaster Railroad Company against Samuel N. Rowland, to recover a balance upon a subscription to its capital stock.

It appears by the evidence that on March 24, 1868, an act of assembly was passed incorporating the Delaware River & Lancaster Railroad Company, for the purpose of constructing a railroad "from a point on the Delaware river, at or near Point Pleasant in Bucks county, touching Phœnixville, to a point at or near Lancaster city, in Lancaster county; . . . *Provided,* That said company shall commence said road within two years from the passage of this act."

A supplement to that act was passed February 10, 1870, granting an extension of three years for the commencement of the road, making a period of five years, and covering the space of time from the date of the passage of the original act, to March 24, 1873.

Commissioners were appointed under the first act of assembly, for the purpose of obtaining subscriptions to the stock of the company, and performing such other duties as were necessary in the commencement of operations.

On June 18, 1868, prior to the organization of the company, the defendant subscribed for four shares of its capital stock.

On September 15, 1871, letters patent were issued to the company, and on October 12, 1871, the company was formally organized by the election of proper officers.

In 1872 another act of assembly was passed, which authorized the company "to locate, build, construct, and operate the said railroad by the most available route from a point on the Delaware river, at or near Point Pleasant, in Bucks county, to a point at or near Lancaster city, in Lancaster county, and to connect with any railroad now constructed, or that may at any time be constructed, at either end or at any intermediate point on the line or route thereof."

The act of assembly incorporating the company directed that the road should touch Phœnixville, authorizing its construction from the Delaware river, at or near Point Pleasant, in Bucks county, touching Phœnixville, to a point at or near Lancaster city.

The act of 1872, however, did not require the company to

construct the road "touching Phœnixville," but authorized its construction by the most available route from the Delaware river, at or near Point Pleasant, to a point at or near Lancaster city, connecting with other roads, etc.

In 1882, fourteen years after the passage of the original act of incorporation, and eleven years after letters patent had been issued, a call was made by the company for the payment of the subscriptions to the stock. Prior to that time there had been no call made; but at that time, by a resolution of the board of directors, a call was made for the payment of the subscriptions in ten installments of $5 per share, the par value being $50, extending from February 10, 1883, to November 15, 1883.

On September 10, 1883, the defendant paid $60 on account of his subscription of four shares, being three installments of $20 each. This payment was made about two months before the last installment fell due, and consequently after the date of the preceding eight installments.

[The defendant now declines to pay the balance of his subscription, on the ground that the company does not contemplate the construction of the road, and that in fact the project has been abandoned. This is the question for your determination, and if you find that the construction of the road has been abandoned, the defendant is entitled to your verdict.]

The charter was obtained in 1872, and, under the original act of assembly and its supplement taken together, five years was named as the period in which the construction of the road was to be commenced. In the winter of 1872–73 some grading was done on the property of Christian Mast, in the neighborhood of Springfield, under a verbal contract with George W. Crane, who testified that he worked there for about three months, grading a section of about 600 feet, when he was directed to cease the work; and since that time no further work in the way of grading has been done by the company.

It appears that this work was done before the expiration of the five years prescribed by the act of assembly for the commencement of the road. In considering the allegation of the defendant that the road has been abandoned, you will determine whether the work done by Mr. Crane, under the verbal contract, was a bona fide effort on the part of the company to construct the road, or whether the work was simply for the purpose of complying with the provisions of the charter, limiting the time of

its commencement, and was not afterwards followed by any other work.

In 1875 the company made a contract with Bush & Co., a firm in New York; but there has been no evidence given as to its terms, and it does not appear that any work was done in pursuance therewith.

On August 29, 1882, a contract was made with Layman, Walker & Co., of New York, about ten years after the first work was done on the road by Mr. Crane, under his verbal contract; but up to that time no other effort had been made toward its construction. Bush & Co. were to have been united in the contract with Layman, Walker & Co.; but they subsequently declined doing so, on the ground that they were strangers to them, and consequently the contract was made simply with Layman, Walker & Co.

It appears that Layman, Walker & Co. made some preparations for the carrying out of this contract, in the way of contracting for rails and locomotives, and the horses and carts were sent to a certain section of the road, but nothing visible to the eye was done towards the gradation of the road. The company afterwards became dissatisfied with the action of these contractors and the contract was finally canceled, since which time no further contract has been made by the company with any parties for the construction of the road, and, so far as practical results are concerned, the position of affairs remains to-day the same as it was when George W. Crane ceased the limited amount of grading he accomplished in 1873, in the vicinity of Springfield.

It was during the existence of the contract with Layman, Walker & Co. that the partial payment of his subscription to the stock of the company was made by the defendant, the date of the contract being August 29, 1882, and that of the payment September 10, 1883. The date of the rescission of the contract has not been given, but the evidence seems to indicate that it was after this payment by the defendant.

On March 1, 1873, the board of directors placed a mortgage of $2,000,000 upon the road; and bonds were issued amounting to $1,000,000. The plaintiff contends that, owing to the failure of Jay Cooke, and the unsettled condition of the monetary affairs of the country at that time, the bonds were not negotiated, but placed in the hands of the trustee in New York, where they

remained until 1882, a period of nine years, when they were hunted up and found in the garret of the trustee, who delivered them to the company.

On November 1, 1882, a new mortgage of $2,000,000 was placed on the road, and $1,000,000 of bonds issued, but never negotiated. It was in this year that the contract was made with Layman, Walker & Co. and that engineers were sent on the road for the purpose of revising the location between Phœnixville and Lancaster City. The line was first surveyed between these points in 1872–73; and from that time to 1882, no other survey or revision of the line appears to have been made.

It also appears that the company obtained some releases, or agreements to release, about the time the engineers were surveying the line in 1872–73. The officer of the company having the matter in charge followed them along the road, and when they announced its definite location, he called on the landowners in reference to obtaining the right of way and arranging the settlement of the damages, wherever it was practicable.

[I have thus briefly referred to the testimony bearing upon the question of the abandonment of the road, and whether the plaintiff intends in good faith to place it in operation. If you find that it does not intend to construct the road, as contemplated by the act of assembly, and has abandoned the enterprise, it is not entitled to your verdict.

The defendant subscribed to the stock of the company for the purpose of enabling it to construct the road; and if the project has been abandoned, there is no reason why he should be compelled to pay the balance of the subscription.] If, however, it is the purpose of the company to construct the road, and the project has not been abandoned, then the plaintiff is entitled to your verdict for the balance of the unpaid subscription, with the penalty added by the act of assembly for the nonpayment of subscriptions.

The assignments of error specified certain rulings upon the evidence and the portions of the charge inclosed in brackets.

E. D. North, D. Smith Talbot, and *William B. Waddell,* for plaintiff in error.—A subscription to the stock of a railroad company, under the act of February 19, 1849, made to the commissioners, before the organization of the company, upon condi-

tion that the road should be located on a special route, is to be deemed an absolute subscription, without reference to the condition. The commissioners have no power to receive any other than unconditional subscriptions; but such conditional subscription is not a nullity. It is the condition that is illegal; the subscription is single and absolute. Pittsburgh & S. R. Co. v. Biggar, 34 Pa. 455; Bavington v. Pittsburgh & S. R. Co. 34 Pa. 358; Boyd v. Peach Bottom R. Co. 90 Pa. 169; Pittsburg & S. R. Co. v. Woodrow, 3 Phila. 275.

The benefit which results to individual property by the incorporation of a company and location of a public road does not, in contemplation of law, enter into the consideration of the contract of subscription; and such subscriptions are necessarily subject to the power of the legislature to change the location of the road, where the contrary is not expressly stipulated. Irvin v. Susquehanna & P. Turnp. Road Co. 2 Penr. & W. 466, 23 Am. Dec. 53; Pierce, Railroads, 66.

The amendment of a charter, at the instance of the managers, will not affect the liability of a subscriber, to pay the amount subscribed for by him. Clark v. Monongahela Nav. Co. 10 Watts, 364; Cross v. Peach Bottom R. Co. 90 Pa. 392; Pierce, Railroads, 66, 70.

Every man is presumed to know the law (Real Estate Sav. Inst. v. Linder, 74 Pa. 371; Finnel v. Brew, 81 Pa. 362; Ege v. Koontz, 3 Pa. St. 109; Taylor v. Board of Health, 31 Pa. 73, 72 Am. Dec. 724); and it was immaterial whether the defendant did or did not know that the act of 1872 had been passed (Shaeffer v. Kreitzer, 6 Binn. 430; Delaware & H. Canal Co. v. Barnes, 31 Pa. 193; Pennsylvania R. Co. v. Butler, 57 Pa. 335).

Under the charge of the court below, the decision of the case turned wholly upon the question of the abandonment of the road. This could only have been put on the ground of analogy to the statute of limitations, or of a presumption to be drawn therefrom, because of delay in bringing the suit.

As no statute requires that, in cases where a creditor must make a demand before he can sue, the demand shall be made within six years from the date of the contract, or action be debarred, any rule exacting demand within that time can have no other basis upon which to rest than a presumption that the

debt has been paid, or the deposit withdrawn. Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507.

The statute of limitations begins to run on calls for installments to the capital stock of a railroad company from the time they are duly made. Redf. Railways, § 52, p. 81; Pierce Railroads, 77; Gibson v. Columbia & N. R. Turnp. & Bridge Co. 18 Ohio St. 396; Taggart v. West Maryland R. Co. 24 Md. 563; Western R. Co. v. Avery, 64 N. C. 491; Ross v. Lafayette & I. R. Co. 6 Ind. 297. See also Sinkler v. Indiana & E. Turnp. Road Co. 3 Penr. & W. 149; Howland v. Cuykendall, 40 Barb. 320: Smith v. Bell, 107 Pa. 352; Scovill v. Thayer, 105 U. S. 143, 26 L. ed. 968; Little v. Blunt, 9 Pick. 488; Picquet v. Curtis, 1 Sumn. 478, Fed. Cas. No. 11,131; Finkbone's Appeal, 86 Pa. 369; Girard Bank v. Bank of Penn Twp. 39 Pa. 92, 80 Am. Dec. 507.

Section 8 of the act of February 19, 1849, to the provisions of which this company is made subject, gives the directors of the company the power to determine when calls for installments shall be made, in conformity with the provisions of the said section; and no restriction is imposed as to the time within which such calls shall be made, and this is also the solemn agreement between the parties, as expressed in the defendant's subscription. By the provisions of said act, no action could have been brought against a subscriber to the stock for an installment due on his subscription, until after demand made as therein provided; nor could the stock have been forfeited to the use of the company on account of default of payment. The statute of limitations would, therefore, not begin to run against a subscription until after calls have been duly made in conformity with the requirements of the act.

But in Pittsburgh & C. R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770; McCully v. Pittsburgh & C. R. Co. 32 Pa. 25, and Pittsburgh & C. R. Co. v. Graham, 36 Pa. 77, it is said that although the statute of limitations does not begin to run against a subscription to the stock of a railroad company until after calls are made for installments, yet where no calls are made for more than six years from the date of the subscription, the law will presume an abandonment of the contract and, from analogy to the statute, bar the recovery, unless the delay be accounted for.

Under the peculiar facts and the charter in these cases it was held that no call having been made within six years, and the

delay not being satisfactorily accounted for, by analogy to the statute of limitations the right to call, after that, was barred, and consequently no recovery could be had thereafter against the plea of the statute. Yet, in Pittsburgh & C. R. Co. v. Plummer, 37 Pa. 413, this principle was not applied, and the plaintiff was allowed to recover, notwithstanding the plea of the statute of limitations, on the ground that the defendant had tacitly recognized his subscription within six years.

In Finkbone's Appeal, 86 Pa. 368, the court intimates that the doctrine announced in Laforge v. Jayne, 9 Pa. 410, which was cited and relied upon by the court in Pittsburgh & C. R. Co. v. Byers, 32 Pa. 22, 72 Am. Dec. 770, is overruled. See also Smith v. Bell, 107 Pa. 352.

There is no provision in the act of March 24, 1868 (P. L. 429), or any of its supplements, or in the act of February 11, 1849 (P. L. 79), to which the plaintiff company is subject, requiring demand to be made, or suit brought, within six years. The contract is under seal, and there is no statutory limitation of time within which suit must be brought on such a contract; but the law raises a presumption of payment, after the lapse of twenty years. By parity of reasoning, the same analogy would allow the demand to be made within the same length of time. The seal imports consideration, if any were necessary. The statute of limitations is a personal privilege, and may be waived by the defendant, and it must be specially pleaded, or it is waived. Chitty, Contr. 945 and note.

A defendant cannot avail himself of the statute, merely because the proceedings of the plaintiff show a case to which it might be applied. Chambers v. Chalmers, 4 Gill & J. 420, 23 Am. Dec. 572.

The action of ejectment is the exceptional case in which the statute of limitations may be set up under a plea of the general issue; but it required an act of assembly to establish this exception. Whenever a statute does not authorize it, an act of limitation, which is a bar to the action and does not touch the merits, cannot be put in under the general issue. Heath v. Page, 48 Pa. 142.

The same rules of presumption apply to corporations as to private persons. Bank of United States v. Dandridge, 12 Wheat. 70, 6 L. ed. 554.

The defendant has waived the statute by paying to the com-

pany the first three installments on his stock, amounting to the sum of $60, in cash, on September 10, 1883, under the calls of the company. This would bind him as upon a new subscription. This principle is recognized in McCully v. Pittsburgh & C. R. Co. 32 Pa. 33. See also Boyd v. Peach Bottom R. Co. 90 Pa. 169; Pittsburgh & C. R. Co. v. Stewart, 41 Pa. 54; Pittsburgh & C. R. Co. v. Plummer, 37 Pa. 413.

If the defendant had acted as commissioner or director, or participated in a stockholders' meeting, or performed any act recognizing his membership of the company, or tending to fasten liability on other subscribers, he should be held to the payment of his subscription, notwithstanding the failure of the commissioners to exact the payment required by law to make it valid and binding. Boyd v. Peach Bottom R. Co. 90 Pa. 172.

In a suit against a subscriber for a second installment, evidence that he had paid the first, on representations of a trustee that enough stock had been furnished to finish the building, was inadmissible to rebut the presumption that he had ratified his subscription by paying the installment. The defendant voted at meetings of stockholders, offered to sell his stock, and paid an installment, and this was held a ratification of his subscription. Craig v. Cumberland Valley State Normal School. 72 Pa. 46. See also Erie & W. Pl. Road Co. v. Brown, 25 Pa. 156; Everhart v. West Chester & P. R. Co. 28 Pa. 339; Bedford R. Co. v. Bowser, 48 Pa. 29; Hanover Junction & S. R. Co. v. Grubb, 82 Pa. 36; Bavington v. Pittsburgh & S. R. Co. 34 Pa. 363.

A subscription to a joint stock is not only an undertaking to the company, but with all other subscribers, and, even if fraudulent as between the parties, is to be enforced for the benefit of the others in interest. Graff v. Pittsburgh & S. R. Co. 31 Pa. 489.

A part payment of a debt has always been held to take it out of the statute, the six years being counted from such payment. 2 Parsons, Contr. 353.

A payment on account of an existing debt is an unequivocal acknowledgment, and will take it out of the statute of limitations. Barclay's Appeal, 64 Pa. 69.

Under these circumstances the statute of limitations, or any presumption to be drawn from analogy, to the statute, cannot avail the defendant. There could be no abandonment without

an intention to abandon. To constitute abandonment there must be an actual relinquishment of possession. It is error to submit to the jury the question of abandonment when there is no relinquishment of possession. Miller v. Cresson, 5 Watts & S. 284.

Presumptions from evidence of the existence of particular facts are, in most cases, mixed questions of law and fact; and the court is not at liberty to tell the jury that they may draw such presumption, if the evidence is irrelevant or insufficient. Bank of United States v. Corcoran, 2 Pet. 171, 7 L. ed. 368.

Where a state of facts could not be inferred on a demurrer to evidence, it is error to submit it to the jury as possible, thereby affording a reconciliation of contradictory testimony. Haines v. Stouffer, 10 Pa. 363.

The evidence shows that the company is indebted for right of way; and while there are debts, abandonment alone would constitute no defense to a suit for a subscription to the capital stock of the company.

The abandonment of the construction of a railroad does not, of itself, constitute a defense to a suit to recover debts due the company. While the corporate organization remains, it may collect dues in its corporate name for the payment of debts. Hardy v. Merriweather, 14 Ind. 203; Bish v. Bradford, 17 Ind. 490; Lane's Appeal, 14 W. N. C. 197.

The jury should have been told that if they believed, from the evidence, that the delay in calling in installments was satisfactorily accounted for, that fact would rebut the presumption of the abandonment of the road. There was evidence on that subject, and it should have been submitted to the jury.

If there was a material misdirection, the judgment will be reversed, even though no instructions were asked. Garrett v. Gonter, 42 Pa. 146, 82 Am. Dec. 498.

Thomas & William Butler and *Wm. Aug. Atlee,* for defendant in error.—The rule that a subscription made to railroad commissioners before organization of the company is necessarily unconditional cannot be doubted. The defendant made no attempt to show that any special understanding was held between him and the commissioners taking his subscription, or that he imposed any condition upon his subscription. As the plaintiff company argues, a man is presumed to know the law; and the

defendant as a matter of fact did know it. He was fully aware that the act of 1868, in the light of, and under the terms of, which he subscribed, required on the part of the plaintiff in error certain things—among others, the construction of its road between Lancaster and Point Pleasant by way of Phœnixville. As the defendant testified, in most unequivocal terms, this route was the inducement to his subscription; and being required of the company at the time he subscribed, it was a material element in his contract, not a condition subjoined by assent of the commissioner.

If the company procures an act of assembly altering the termini of the road, the subscriptions are no longer binding. Manheim, P. & L. Turnp. Co. v. Arndt, 31 Pa. 317.

Whenever a power which the subscriber cannot control intervenes to alter a material point in his contract, without his assent, it works his release. Caley v. Philadelphia & C. County R. Co. 80 Pa. 363.

All the authorities cited by the plaintiff in error upon this point are cases in which special agreements were made by a subscriber with a commissioner, and therefore have no bearing upon the case in hand, in which the defendant stands upon a condition embodied in the act of incorporation.

It is admitted by the plaintiff in error that the decision of this case turned wholly upon the question of the abandonment of the construction of the road.

The defendant's position on the trial of this case was that while the plaintiff in error had not passed any formal resolution to abandon the project, yet all the facts (that no contracts to construct the road had ever been made, or if made, were almost immediately revoked; that the few yards of grading done were not done under contract with intention to construct, but evidently to save forfeiture of the charter; that no real effort to do anything in connection with the road, except to attempt to keep the formal organization up by meeting and electing officers) showed conclusively that there was no intention of building the road and that it was abandoned.

PER CURIAM:

We have examined the authorities cited by the counsel for the plaintiff and carefully considered their able and zealous arguments, yet we are not able to find any error in the record which

demands a reversal of this judgment. The evidence of abandonment of the road was sufficient to submit that fact to the jury.

Judgment affirmed.

Amos Walton, Appt., *v.* Levi K. Brown.

Where a written agreement for the purchase and sale of land contains the entire contract between the parties, the vendor should be compelled to give a deed conforming thereto. A deed containing a reservation of a right of way not provided for in the written agreement is not a compliance with such agreement.

(Argued May 17, 1887. Decided May 30, 1887.)

January Term, 1887, No. 116, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Appeal from a decree of the Court of Common Pleas of Lancaster County in favor of plaintiff in a bill in equity to enforce specific performance of a contract between the parties, for the conveyance of a piece of land. Affirmed.

The questions presented appear from the following portion of the report of the master, William Seaman, Esq.:

On the 18th day of August, 1885, L. K. Brown, plaintiff, filed a bill in equity, in which he complains and says:

That Amos Walton, being then the owner of a tract of land situated in Fulton township, Lancaster county, Pennsylvania, adjoining a public road and lands of Samuel C. Wood and said L. K. Brown, containing 70 perches, more or less, on the 14th day of June, 1884, entered into an agreement with said L. K. Brown for the said tract of land; said agreement, executed under the hands and seals of the said parties, was as follows:

Articles of agreement made the fourteenth day of the sixth month, 1884, between Amos Walton and Levi K. Brown, both of Fulton township, Lancaster county, as follows,—*viz.:*

The said Walton doth sell to the said Brown, the school house

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NOTE.—The same decree was made in Anders's Estate, 12 Phila. 45, under similar circumstances. So in Lesley v. Morris, 9 Phila. 110, a title was held not to be marketable when the property was burdened with a building restriction which impaired the enjoyment of the property.

and lot of land on which the school house is erected in said township, known as "Goshen School District," for the sum of $150, $20 to be paid in cash, (at which time said Brown is to have possession), the residue thereof in ten days from this date or as soon as the school directors shall execute a deed for the same to the said Walton. Said Brown to pay for the conveyance which said Walton is to make as soon as the balance of money is paid.

In witness whereof, the said parties have hereunto set their hands and seals the day and date above written.

Amos Walton, [Seal.]
L. K. Brown, [Seal.]

Witness present.
Jacob K. Brown.

That, on the 14th day of June, 1884, Brown paid Walton $20 on account of said purchase money; and, on the 26th day of July, 1884, Walton having then received a deed for the said tract of land from the said school directors of Fulton township, and being in a situation to comply with the said articles of agreement, Brown tendered Walton the balance of the said purchase money in legal tender of the United States, to wit, $130, and at the same time demanded a deed for the said tract of land, which Walton refused to execute and deliver.

The plaintiff prays: "To the end, therefore, that the said articles of agreement, dated the 14th day of June, 1884, may be specifically performed and carried into execution by the said Amos Walton, your orator hereby offering to perform the same on his part; and that the said Amos Walton make your orator a good and sufficient title, your orator offering thereon to pay $130, the balance still due according to the terms of the articles of agreement, above mentioned, and the cost of preparing the same."

Walton properly appeared in court in answer to due process, and on the 10th day of October, 1884, filed an answer to the said bill, in which he says (after reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill contained):

1. That prior to June 14, 1884, defendant had entered into articles of agreement with the school directors of said Fulton

township, for the purchase of the tract of land mentioned and described in the plaintiff's bill.

2. That defendant admits that on the 14th day of June, 1884, he entered into, and executed under his hand and seal, the articles of agreement made part of plaintiff's bill; but further says and avers that the said articles do not contain the entire agreement between the parties; "for it was further stipulated by and between them, and was part of the inducement for the defendant to enter into said agreement, that he should have a right of way over said lot of ground containing 70 perches, more or less, and it was to have been so expressed in said articles of agreement and it was expressly stipulated and agreed that it should be so written in the deed. The complainant wrote said articles of agreement, and omitted to insert therein the words necessary to make said agreement clearly express the intention of the parties, and when presented to defendant for his signature, he refused to sign the same, except with the distinct understanding and agreement that defendant should have the right to pass over and upon said premises and adjoining land of complainant, to and from the other land of defendant, to the public road leading from Fulton House to Wakefield, either along the northern line of said 70 perches of land, or such other place as complainant and defendant might mutually agree to change to, and it was to be so expressed in the deed."

3. The defendant admits that he was to execute and deliver to the plaintiff on the 24th day of June, 1884, or as soon thereafter as the said defendant should receive a deed from the school directors of said Fulton township for the said tract of land, a deed for the same, upon the payment by the said plaintiff of the consideration of $150; but the said defendant further avers that the deed to be executed and delivered by him should contain a reservation of the right to pass over and upon the tract of land and adjoining land of the said plaintiff, as was claimed and fully set forth in the preceding paragraph.

4. The defendant admits that, on the 14th day of June, 1884, the said plaintiff paid him $20 on account of the purchase money for the said tract of land; but denies that the said plaintiff did, on the 26th day of July, 1884, or on any other day, tender the balance of the said purchase money.

5. The "defendant, for further answer, says that on July 26, 1884, he tendered to complainant a properly executed deed, ac-

cording to the contract between them, a copy of which said deed is annexed to and made part of this answer, and which the said complainant refused to accept and pay for, according to the contract between them. Since July 26, 1884, defendant has offered to deliver said deed to complainant on payment by him of said balance of the purchase money, to wit: $130; and he now stands ready to deliver said deed to the complainant, on said payment being made by him, which is according to the contract and agreement between them."

The defendant prays that the plaintiff's bill be dismissed, with costs.

On the 6th day of November, 1884, the plaintiff filed a replication, in which he joined issue with the said defendant on all matters alleged in his answer.

It is found that the plaintiff, on the 14th day of June, 1884, paid the defendant $20 on account of the purchase money, leaving due a balance of $130.

The matters of controversy arise upon the new and positive averment in the defendant's answer, respecting the nature and character of the agreement.

From the whole testimony respecting the agreement, the master finds that the articles of agreement of June 14, 1884, contain the entire contract between Amos Walton and Levi K. Brown. By the said agreement Amos Walton disposes absolutely of all his right, title, and interest in the lot of land in Fulton township, known as the "Goshen School District," without reservation of a right of way over the same to Amos Walton, his heirs, and assigns. The master is not called upon to determine the precise nature of the understanding between Amos Walton and Levi K. Brown in regard to right of way. The right is found to be less in quantity than a perpetual reservation; and, whatever its extent—whether personal to Amos Walton or entirely permissive in its nature—it does not enter into and form part of the contract expressed in the articles of agreement of June 14, 1884, is not in any way connected with the same, and is not involved in the present proceedings.

Controversy also arises upon the denial by the defendant of the plaintiff's allegation that the plaintiff tendered the defendant the balance of the purchase money, *viz.*, $130, and demanded a deed.

From the entire evidence on the controverted point of tender,

the master finds that Levi K. Brown, on the 26th day of July, 1884, made a good and sufficient tender of the balance of the purchase money, $130, to Amos Walton, and demanded a deed in accordance with the written agreement of June 14, 1884.

Controversy arises further upon the defendant's allegation that he tendered a good and sufficient deed, a copy of which is made part of the defendant's answer, in specific performance of the contract as it was actually intended, made and entered into between the parties.

The said deed conveys to Levi K. Brown, his heirs and assigns, all the estate, right, title, interest, property, claim, and demand whatsoever of Amos Walton and Martha, his wife, in law, equity or otherwise, of, in, and to the tract of land described in said deed, being the premises in controversy, "excepting and reserving to the said Amos Walton, and to his heirs and assigns, at any time and at all times hereafter, as a part of the consideration hereinbefore mentioned, to pass over and upon the hereby granted premises, and the adjoining land of said Levi K. Brown, to and from the other land of said Amos Walton, to the public road aforesaid, either along the northern line of the above granted premises, or such other place as may be mutually fixed by the parties."

The master finds that the defendant, on the 26th day of July, 1884, at Penrose Ambler's mill, tendered the deed to the plaintiff; but holds such deed not good, and insufficient. The decision of this point of the controversy is involved in the determination of the preceding disputed matters. Having found that the articles of agreement of June 14, 1884, contain the entire contract between the parties, the master must necessarily hold that a deed containing the reservation above cited would not be in compliance with the terms of the said agreement, or in specific performance of the same.

Freeing the matters in controversy from all discussion, the master finds:

That, on the 14th day of June, 1884, Amos Walton and Levi K. Brown executed, over their hands and seals, articles of agreement, herein above fully transcribed and set forth, by which, for the consideration therein mentioned, the said Amos Walton contracted to sell to the said Levi K. Brown, absolutely and unconditionally, and without exception or reservation, the school

house and lot of ground on which the school house is erected in Fulton township, known as the "Goshen School district."

That said articles of agreement contain the entire contract between the plaintiff, Levi K. Brown, and defendant, Amos Walton.

That, on the 26th day of July, 1884, the plaintiff, Levi K. Brown, made a good, sufficient, and legal tender of the balance of the purchase money, $130, to the defendant, Amos Walton, and demanded a deed in accordance with the said articles of agreement of June 14, 1884.

That the defendant, Amos Walton, declined accepting the balance of the purchase money, $130, so tendered him by the plaintiff, Levi K. Brown, and refused to specifically perform the contract shown by said articles of agreement of June 14, 1884, by delivery of a deed duly executed in accordance therewith, and containing no exception or reservation whatsoever.

That the deed of Amos Walton and wife, containing an exception and reservation of a right of way, is not in compliance with the terms of the article of agreement of June 14, 1884, and is not a good and sufficient deed; and the tender thereof is inoperative and of no effect.

The master, therefore, would report and recommend that specific performance be decreed, as prayed for in the plaintiff's bill.

The defendant filed the following exceptions to the master's report:

The master erred in finding as a fact: (1) That the articles of agreement, marked in plaintiff's bill as Exhibit A, contain the entire contract between the plaintiff, Levi K. Brown, and the defendant, Amos Walton; (2) that on the 26th day of July, 1884, the plaintiff, Levi K. Brown, made a good, sufficient, and legal tender of the balance of the purchase money, $130, to the defendant, Amos Walton; (3) that the defendant, Amos Walton, declined accepting the balance of the purchase money, $130, the same not having been tendered him by the plaintiff, Levi K. Brown; (4) that the deed of Amos Walton and wife, marked Exhibit B, containing an exception and reservation of a right of way, is not a compliance with the terms of the articles of agreement of June 14, 1884 ("Exhibit A"), and is not a good and sufficient deed; and that the tender thereof is inoperative and of no effect; (5) in making report and recommending that a

specific performance be decreed as prayed for in the plaintiff's bill.

The court of common pleas overruled the exceptions and ordered a decree in accordance with the recommendation of the master, and the defendant appealed, assigning as error the action of the court in not sustaining his exceptions to the master's report and in not giving judgment for defendant.

J. W. Johnson and *J. W. F. Swift* for appellant.

Brown & Hensel for appellee.

PER CURIAM:

The master found as a fact that the written agreement contains the entire contract between the parties. The learned judge confirmed that finding. An examination of the evidence fails to convince us that there is error in the finding. It follows that the deed should be according to the terms of the written agreement, and the decree is correct.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Sophia Sieber's Appeal.

Philip C. Ranninger's Estate.

Where a testator by will made within a calendar month before his death bequeaths half of his residuary estate, converted into personalty, to his executor in trust to "place the same out at interest on good real estate security, and pay over the interest thereof annually," to S. "during the term of her natural life, and, from and immediately after the death" of S., bequeaths the principal to a charity, the bequest over is void under the act of April

Cited in McKee's Estate, 26 Pittsb. L. J. N. S. 385, 17 Pa. Co. Ct. 551.

NOTE.—Section 11 of the act of April 26, 1855 makes invalid the devise of real or personal property to any charity within one calendar month of testator's death, unless made for a valuable consideration, or unless fully executed during the testator's lifetime. Reimensnyder v. Gans, 110 Pa. 17, 2 Atl. 425; *Re* Luebbe, 26 Pittsb. L. J. N. S. 224; Vanzant's Estate, 6 Pa. Co. Ct. 625.

26, 1855, and the principal goes after the death of S. to the testator's next of kin.

The rule of construction that, in the absence of a different intention appearing in a will, a bequest of the income of personalty for life without any disposition over is a bequest of the fund itself, is inapplicable to such a case.

(Argued May 18, 1887. Decided May 30, 1887.)

July Term, 1887, No. 56, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Orphans' Court of Lancaster County dismissing exceptions to an auditor's report and directing distribution of a decedent's estate. Affirmed.

The facts as found by J. W. F. Swift, Esq., the auditor appointed to distribute the balance remaining in the hands of Henry M. Shreiner, executor of Philip Christian Ranninger, were these:

Philip Christian Ranninger died on the 19th of February, 1885, having on the 10th of February, 1885, made his last will and testament in which after a revocation of former wills, a direction that all his just debts and funeral expenses be paid, and several small pecuniary legacies including one of $300 to Sophia Sieber, niece of his deceased wife, and then employed as his housekeeper, he proceeded as follows:

"*Item.* All the rest, residue, and remainder of my estate, real, personal, or mixed, whatsoever and wheresoever, I order and direct to be converted into money as soon as the same can conveniently be done after my decease; and for that purpose I do hereby authorize and empower my said executor hereinafter named, to sell and dispose of all my said real estate, either by public or private sale or sales, for the best price or prices that can be gotten for the same, and by proper deed or deeds, conveyances or assurances in the law to be duly executed, acknowledged and perfected, to grant, convey and assure the same to the purchaser or purchasers thereof in fee simple; and when the whole of my residuary estate shall be converted into money as aforesaid, then I will and direct that the same shall be divided as follows: one full equal half part or share thereof I give, devise, and bequeath unto my said executor, hereinafter named, in trust, that he do and shall put and place the same out at interest on good real estate security, and pay over the interest thereof annually unto

the said Sophia Sieber, during the term of her natural life; and from and immediately after the death of the said Sophia Sieber, I give, devise, and bequeath the principal of the said one half, part or share of my said residuary estate to the mayor of the said city of Lancaster and his successors, and the said principal sum to be placed at interest, and the said interest arising therefrom to be used for the support of the poor and needful in the said city of Lancaster forever. And the remaining one full equal half, part or share of the proceeds of my said residuary estate, I give, devise and bequeath unto my said executor, hereinafter named, in trust, that he do and shall put and place the same out at interest on good real estate security, and pay over the interest thereof annually unto my said son, Charles Philip Ranninger, during the term of his natural life; and from and immediately after the death of my said son, Charles Philip Ranninger, I give, devise and bequeath the principal of the said one equal half, part or share of my said residuary estate, to the mayor of the said city of Lancaster and his successors, and the said principal sum to be placed at interest, and the said interest arising therefrom to be used for the support of the poor and needful in the said city of Lancaster, forever."

On the 25th day of February, 1885, letters testamentary were granted to Henry M. Shreiner, the executor named in the will. The son, and only child of the testator, Charles Philip Ranninger, died on the 21st day of February, 1885, intestate, leaving to survive him a widow, Mrs. Emily L. Ranninger, and a child, Minerva Ranninger; and letters of administration were granted, on the estate of the testator's said son, to his widow, Mrs. Emily L. Ranninger.

On September 8, 1885, the widow and administratrix of Charles Philip Ranninger, deceased, as plaintiff, v. the Mayor of the City of Lancaster, the City of Lancaster, Sophia Sieber, and Henry M. Shreiner—executor and trustee named in the last will and testament of Philip Christian Ranninger, deceased,—defendants, filed a bill in equity, praying that the charitable bequest to the mayor of Lancaster city and his successors be declared void, and in pursuance thereof the court on April 8, 1886, decreed that, under § 11 of the act of April 26, 1855, "the said charitable bequest was void by reason of the said bequest having been made within one calendar month of the testator's death."

The auditor reported, *inter alia,* as follows:

We find that Sophia Sieber is entitled to and shall be paid the interest, during her natural life, of one half of the corpus of this estate; first deducting the debts, specific legacies, and legal expenses incurred in this estate. Primarily, there can be no doubt that this was the intention of the testator. In the second place, a bequest of the (income) interest is not *per se* in law, a gift of the principal; particularly when taken into connection with the legal interpretation of § 11 of the act of assembly of 1855.

The act was intended to supply that portion of a will made void in consequence of a charitable bequest not having been made within a calendar month, prior to the testator's death. A strict construction of the law, together with our sense of what is right, would certainly not divert that portion of a testator's estate, undisposed of, to strangers. If void as a charitable bequest, the estate, when not otherwise disposed of, would unquestionably go to the next of kin of the testator.

We, therefore, conclude (as to the construction or interpretation of the act of assembly relating to his estate) that where a life estate is made by a testator, under and by virtue of the provisions of his last will and testament; and when the said testator had not made his said will within one calendar month prior to the decease, the residue, when not otherwise disposed of, goes to the next of kin of the testator.

We, therefore, direct that the corpus of one half of this estate (after the deduction of the payment of the debts, specific legacies and legal expenses incurred in this estate) shall remain in the hands of the executor and testamentary trustee, Henry M. Shreiner; and that the interest accruing annually thereon shall be paid annually to the said Sophia Sieber, during her natural life; and that after her decease the said principal sum shall be paid to the next of kin, or his legal representatives under and by virtue of the laws of the commonwealth of the state of Pennsylvania.

Exceptions to the auditor's report, *inter alia,* that the auditor did not award one half of the residuary estate to Sophia Sieber, were dismissed by the court below and the report was confirmed.

The assignments of error specified the action of the court: (1) In dismissing the above exception; and (2) in not awarding half the residuary estate to the appellant, absolutely.

A. O. Newpher, for appellant.—No presumption of an intent to die intestate is to be made when the words of the testator will carry the whole. Stehman v. Stehman, 1 Watts, 466; Little's Appeal, 81 Pa. 190; Raudenbach's Appeal, 87 Pa. 51; Hofius v. Hofius, 92 Pa. 305.

The testator intended to convert all his estate into personalty, and the language of his will converts his entire estate into personal property; and it is to be disposed of only as such.

The words, "All the rest, residue, and remainder of my estate, real, personal, or mixed, I order and direct to be converted into money," convert all the residue of his estate into personal property. Willing v. Peters, 7 Pa. 287; Jones v. Caldwell, 97 Pa. 42; Roland v. Miller, 100 Pa. 47; Bright's Appeal, 100 Pa. 602.

The bequest to the mayor of the city of Lancaster is void, being a bequest to a charity (1 Purdon's Digest, 252, pl. 27); and leaves the corpus of the half of the residue of the estate undisposed of. Having given the income and interest of it to the appellant, without a bequest over, or any further disposition of it, the beneficiary of the life estate is entitled to the principal or corpus of the estate.

Whenever it is possible, the bequest of the use of a thing or the product or interest of a fund is to be regarded as a bequest of the thing itself. Parker's Appeal, 61 Pa. 478, 484.

A bequest of the personal estate to a legatee for life, without any disposition of it over after his death, belongs to him absolutely. Brownfield's Estate, 8 Watts, 465; Silknitter's Appeal, 45 Pa. 365, 84 Am. Dec. 494.

A gift of the income or produce of a fund is a gift of the fund itself. Pennsylvania Co. for Ins. on Lives & G. A.'s Appeal, 83 Pa. 312; Keene's Appeal, 64 Pa. 268; France's Appeal, 75 Pa. 220; Garret v. Rex, 6 Watts, 14, 31 Am. Dec. 447.

The rule applies whether the income of the fund be given directly or through the intervention of trustees. Haig v. Swiney, 1 Sim. & Stu. 487; Hawkins, Wills, 123; Garret v. Rex, 6 Watts, 14, 31 Am. Dec. 447.

When the subject of the gift is residue, there is a strong inclination in the court in all cases to make the gift vested, when it is possible, in order to avoid intestacy. Pearman v. Pearman, 33 Beav. 396.

The testator plainly indicates that he intended to make the appellant the first and main object of his bounty. As she was

first and mainly in his mind in making his will, so will the law favor his grateful intentions and purposes. Wilson v. McKeehan, 53 Pa. 79; Rewalt v. Ulrich, 23 Pa. 388.

William H. Livingood and *Eugene G. Smith,* for appellee.—We admit that there is a conversion of the entire estate into personal property under the will; that a bequest of personal property to a legatee for life, without any disposition over, belongs to him absolutely; and that the right to use or consume the whole if needed is a devise of the thing itself. But here there is a bequest over; and although the bequest is void, yet it clearly shows the intention of the testator not to give the corpus of his residuary estate to Sophia Sieber; and the property thus sought to be bequeathed, being given to another, goes to the heirs or next of kin, according to law. Davis's Appeal, 83 Pa. 354.

Garret v. Rex, 6 Watts, 14, 31 Am. Dec. 447; Brownfield's Estate, 8 Watts, 465; and Keene's Appeal, 64 Pa. 268, have no application to the present case, wherein the testator appointed an active trustee to convert the estate and pay over the interest of one half "annually to the said Sophia Sieber during the term of her natural life." McDevitt's Appeal, 113 Pa. 103, 5 Atl. 777.

The act of April 26, 1855, § 11, provides that "no estate, real or personal, shall hereafter be bequeathed, devised, or conveyed to any body politic, or to any person, in trust for religious or charitable uses, except the same be done by deed or will, attested by two credible, and at the same time, disinterested witnesses, at least one calendar month before the decease of the testator or alienor; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin or heirs, according to law."

The bequest to Sophia Sieber and the void bequest to charity are contained in the same residuary clause. There are no words indicating that the survivor shall take. The intent is clear; hence, the void bequest must go to the next of kin—and as to the property embraced in this bequest the testator died intestate by force of the statute.

A lapsed devise in the body of the will, as well as a legacy, falls into the residuum, and goes to the residuary legatee or devisee. It was always so as to personalty, and it was made so as to realty by the Act of June 4, 1879. In Everman v. Everman,

15 W. N. C. 417, the court held: "The act of June 4, 1879, P. L. 88, makes the law respecting the devolution of a lapsed devise the same as it is in the case of a lapsed bequest. No doubt the act was passed in consequence of the decisions in Yard v. Murray, 86 Pa. 113, and Massey's Appeal, 88 Pa. 470, in the first of which it was held that a lapsed devise descends to the heir at law, and in the second that a lapsed bequest falls into the residue and goes to the residuary legatee. Having in view the old law, the mischief and the remedy, we are of opinion that the act of 1879 was intended to apply only to lapsed specific devises in the body of the will, and that as to lapsed shares of the residue, no change was intended or effected."

If the residue of an estate, either real or personal, is given to persons by name, and not in a class, each is entitled to a share and no more; and if there should be a lapsed share of the residue, it goes to the next of kin if it consists of personalty, and to the heirs, if realty. Williams v. Neff, 52 Pa. 326, and Neff's Appeal, 52 Pa. 326; Barber v. Barber, 3 Myl. & C. 688; Spencer v. Wilson, L. R. 16 Eq. 501; Sohier v. Inches, 12 Gray, 386.

The act of 1879 is a copy of the English wills act of 1837. Bagwell v. Dry, 1 P. Wms. 700; Man v. Man, 2 Strange, 905; Craighead v. Given, 10 Serg. & R. 354.

This act of 1855 is not in conflict with the intestate laws, or any law relating to the distribution or devolution of decedents' estates. The act reads: "And all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, next of kin, or heirs, according to law." That is, the void devise or legacy is to be distributed according to law. As to property embraced in the void devise or bequest, the decedent dies intestate.

Residuary legatees are named in this act simply because in cases where a bequest or devise is made in the body of the will to some charity, and afterwards, in the residuary clause, the residue of the estate is bequeathed to a person, then in case of lapse or voidance it would fall into the residue and go to the residuary legatee. But in any event Miss Sieber, according to the clearly expressed intention of this testator, was to receive only the interest of one half of the corpus of the residuary estate; and in the event of a lapsed bequest even in the body of the will, it would be added to the corpus of the residuary, and there-

by only increase the interest; the corpus would go to the next of kin.

PER CURIAM:

The language of the will of the testator is such that in our opinion it is clear he intended to give to the appellant the interest during her life only, of one half of his residuary estate. The failure of the devise ever to take effect did not enlarge her portion. As to that he died intestate.

Decree affirmed and appeal dismissed, at the costs of the appellant

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Albert R. Sharp's Appeal.

Isabella Sharp's Estate.

The discretion of the orphans' court to order a testamentary trustee to give security for the faithful execution of his trust will not be reversed, except for an abuse of the discretion.

(Argued May 19, 1887. Decided May 30, 1887.)

July Term, 1887, No. 99, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from the Orphans' Court of Lancaster County to review a decree directing a testamentary trustee to give security. Affirmed.

The case was heard on petition for citation and answer. No replication was filed.

The facts are stated in the following opinion of the court below, by PATTERSON, J.:

The petitioner, a brother of the said trustee, and who is the *cestui que trust* of the fund in trust, presented in court and filed his petition March 19, 1886, praying for a citation to Albert R.

NOTE.—For the power to require bond from executors, see note to Colton's Appeal, 2 Sad. Rep. 477.

Sharp, his trustee, that he give security as such trustee, or that he be dismissed.

To the citation, the said trustee put in his answer denying the allegations set forth in the petition. Both petitioner and respondent took depositions. The witnesses called (testifying for the parties respectively) were the petitioner in support of his petition, and the respondent in support of his answer filed. It appears that Albert R. Sharp is a testamentary trustee, and has given no security for the trust which he assumed. The amount of said trust fund, as appears by his account, confirmed nisi March 16, 1885, and which became confirmed absolutely, is $2,252.61—to the net income of which the *cestui que trust* is entitled during his lifetime.

The records submitted to the court and the depositions filed show that after the testator's decease (who was the mother of both the trustee and the *cestui que trust*), the former took to his own house in Harrisburg his brother, the *cestui que trust*, who is a cripple and unable to perform manual labor; took him there in March, sometime, of 1884, and kept him there until sometime in October of that year. From there he went to the Lancaster County Hospital, where he has remained ever since. He testifies that he went there only because he had no other place to go to, and that he was choked out of the house of his brother, the trustee. This latter the trustee emphatically denies under oath. He answers, however, to a question asked by his own counsel,—to wit, "Is Charles R. Sharp a person whom it would be pleasant or desirable to have in a private house?" "He is not; he is very rough in his habits and ways; he is not cleanly."

This and other facts made to appear show that the feeling between these brothers is not that of warm, brotherly affection. Besides, it appears that the trustee is not a person of much estate; he is a cabinet maker and testifies that he has no debts. That he is mismanaging the estate in his hands does not very clearly appear. Yet it does appear that a note, with interest, due the estate at the death of the testatrix and amounting to over $2,000, was paid in April of 1886, and when asked on the 13th of December, 1886, at the time of taking his deposition,—*viz.*, Question: "How is the trust money of which you are trustee invested?" He answered: "It is not invested, it is in bank; in the Mechanics' Bank of Harrisburg; I think it is deposited there as executor;" "I have a bank book;" and being asked

"How much is it?" he answered: "That I cannot say, unless I have my book—it is all there; I am not the owner of any real estate."

Further, the account filed by the executor and trustee on February 12, 1885, and confirmed March 16, 1885, shows that the accountant charged commissions of 5 per cent on both personal and real estate proceeds— the latter amounting to $1,000; that is, the purchase money of realty amounted to that sum. Now such transactions may not actually be wasting the property or estate under his charge, in the exact sense of the term, but it is certainly "mismanaging the property." And the act of assembly expressly says: if a committee or trustee is wasting or mismanaging the property or estate under his charge, or for any reason the interests of the estate or property are likely to be jeopardized by the continuance of any such trustee, or when such trustee, etc., is or is likely to prove insolvent, etc., the court may issue a citation requiring him to respond to the same and abide the order of the court. On the whole the court is of the opinion that enough has been shown to justify an order that this trustee shall give bail to secure the faithful discharge of his trust.

Therefore, now, to wit, January 15, 1887, the court orders and decrees that Albert R. Sharp, trustee, etc., shall give a bond with security, to be approved by the court, in double the amount of the trust estate in his hand, for the faithful execution of his trust, otherwise to be dismissed as such trustee. Bond to be given on or before the 5th day of February next.

The assignment of error specified the action of the court in making the above decree.

George Nauman, for appellant.—By the act of March 29, 1832, 1 Purd. 558, pl. 249, there may be security required when it shall be made to appear that an executor is wasting or mismanaging the estate or property under his charge, or is likely to prove insolvent, or has neglected or refused to exhibit a true and perfect inventory, or render full and just accounts.

By the act of May 1, 1861, 1 Purd. 560, pl. 257, when it shall be made to appear that an executor is mismanaging the property or estate under his charge, or that for any reason the interests of the estate or property are likely to be jeopardized

by his continuance, or when he is likely to prove insolvent, or has neglected to exhibit a true and perfect inventory, or render full and just accounts, security may be required or removal made.

In either case, however, and under either act, there must be citation, answer, and proof; and the power of the court is limited to the causes named in the acts. Cohen's Appeal, 2 Watts, 175; Webb v. Dietrich, 7 Watts & S. 401.

It will be observed that every material allegation of the petition was denied by the answer; and, there having been no replication filed, the answer must be taken as absolutely true. Kellberg's Appeal, 86 Pa. 129.

In a proceeding under the acts referred to above, it must clearly appear that a case was made out under it, and that the discretion of the court was properly exercised. Parsons's Appeal, 82 Pa. 465.

"Insolvency is the state of a person who, from any cause, is unable to pay his debts in the ordinary or usual course of trade." Levan's Appeal, 112 Pa. 294, 3 Atl. 804.

The testator chose the appellant to execute her will; she knew that she could trust him, and asked no security; and the court cannot do it on a case like this. Cohen's Appeal, 2 Watts, 175; Webb v. Dietrich, 7 Watts & S. 401; Harberger's Appeal, 98 Pa. 29.

W. R. Wilson and *H. M. Houser,* for appellee.—The case was heard by the court below on its merits, and the decision by said court will not be altered "in the supreme court for anything short of palpable injustice." Nicholson's Appeal, 20 Pa. 50.

The strong language found in Parsons's Appeal, 82 Pa. 465, was predicated upon proceedings based solely upon the act of May 1, 1861, authorizing the summary removal of such a trustee.

Considering that he may at any time resign or relinquish his trust, the decree requiring him to give security ought not to be such a hardship as to excuse him from complying with our reasonable request. M'Kennan's Appeal, 1 Grant Cas. 364.

"Nothing but some controlling necessity will justify the retention of a fiduciary whose interests are inharmonious with those of the *cestui que trust* or disadvantageous to them, and

whose conduct shows it." Scott, Intestate Laws, Revised ed. p. 266; Kellberg's Appeal, 86 Pa. 129.

A trustee is removable when his continuance in office, although not jeopardizing the trust, might probably work disadvantage or inconvenience in the *cestui que trust.* Hilles's Estate, 9 W. N. C. 421.

Cohen's Appeal, 2 Watts, 175, and Webb v. Dietrich, 7 Watts & S. 401, are cases not in point. In those cases the application was, not to make the trustee give bail as in the case in hand, but to remove them at once. The supreme court said this could not be done.

Nor is Harberger's Appeal, 98 Pa. 29, in point. In that case the application requiring the executor and trustee to give bail seemed to have been based solely upon the fact that he lived in Philadelphia; and in neither of those cases was there proof of inharmonious and antagonistic relations between trustee and *cestui que trust,* as exists in this case.

PER CURIAM:

It may be conceded that this evidence does not present a flagrant case of mismanaging the estate; yet the facts stated in the opinion of the learned judge do present some reason why the interests of the estate should be more adequately protected. We see no such abuse of the discretion wisely placed in the court, as to require its action in this case to be reversed.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Jacob R. Landis, Plff. in Err., *v.* A. P. Neff.

In replevin for goods obtained by an infant upon a false representation as to his age, and delivered by him to the defendant, his father, who alleges that the delivery to him was bona fide to pay a debt, the question whether

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Cited in Schoeneman v. Weill, 3 Pa. Super. Ct. 119, 123, 14 Lanc. L. Rev. 66, and Ralph v. Fon Dersmith, 10 Pa. Sup. Ct. 481 490, 16 Lanc. L. Rev. 385.

NOTE.—Transfers of property between a parent and child are not in themselves fraudulent, but the fraud alleged must be proven as in other cases. Coleman's Estate, 193 Pa. 605, 44 Atl. 1085; Hummel v. Kistner, 182 Pa. 216, 37 Atl. 815; Fritz's Estate, 160 Pa. 156, 28 Atl. 642. And fraud must be shown on the part of both. Collins v. Cronin, 117 Pa. 35, 11 Atl. 869.

there was such fraud as to vitiate the defendant's title to the goods is, upon a conflict of testimony, a question for the jury.

In such an issue it is competent to prove that similar goods were obtained from others and delivered to the defendant in the same way.

(Argued May 17, 1887. Decided May 30, 1887.)

January Term, 1887, No. 116, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Error to Common Pleas of Lancaster County to review a judgment on a verdict for the plaintiff in an action of replevin. Affirmed.

At the trial before LIVINGSTON, P. J., the following facts appeared:

In the spring of 1883, G. G. Landis, a minor son of Jacob R. Landis, the plaintiff in error, engaged in the cigar business at Lima, Ohio. In May of that year he went to A. P. Neff, the plaintiff below, in York county and purchased some cigars from him, two cases of which were shipped to Lima. It is contended by Neff that when young Landis got the cigars he represented that he had just attained his majority, that he was about to go into the cigar business at Lima, Ohio, and that his father and a man named N. N. Bender were backing him. These representations, except the one as to his age, were true.

After the two cases of cigars had been received at Lima, the plaintiff in error, the father of young Landis, went to his son's place of business and received those cigars and some others, in payment of a note he held against his son. Jacob R. Landis alleged that he knew nothing of his son's indebtedness for the cigars at the time he took them in payment of the note. The cigars were at once shipped by Jacob R. Landis to his home at Rothsville, Lancaster county. Young Landis did not pay Neff, and in the summer of 1883 the latter proceeded with other creditors by domestic attachment to make his money.

The proceedings having been instituted against G. G. Landis, the attachment was dissolved by reason of his infancy. Upon the dissolution of the attachment Neff issued a writ of replevin for his two cases of cigars, which he alleged had been attached

So where a bill of sale is executed as in LANDIS v. NEFF, the evidence must show that the transaction was not bona fide. Forsyth v. Matthews, 14 Pa. 100, 53 Am. Dec. 522. The question is for the jury in case of conflict. Stull v. Weigle, 20 W. N. C. 98.

under the domestic attachment and were in the possession of Jacob R. Landis. He claimed to have a right to recover his goods, upon the ground that G. G. Landis had obtained them by fraudulent misrepresentations and he could follow them in the hands of Jacob R. Landis, the vendee of G. G. Landis. On the first trial the plaintiff below was nonsuited, upon the ground that as he had absolutely parted with his property by sale he could not maintain his suit; but the judgment was reversed (Neff v. Landis, 110 Pa. 204, 1 Atl. 177), and the case tried again.

The plaintiff and a witness testified to the representations as to age, etc., made by G. G. Landis and the shipment of the cigars by the plaintiff to him.

The witness, Rahauser, under objection and exception, testified as follows:

[Shown, "York Gazette," May 15, 1883.] "I saw the advertisement of G. G. Landis in this paper; I wrote him a letter to Lima, Ohio, sending him a sample; I sold him a case, 10,000 cigars, factory 480, brand 'Companion,' at $9 per 1,000; shipped them in the latter part of May, 1883, at York, to G. G. Landis, Lima, Ohio; he has not paid me for them; I am the same Reuben Rahauser who became a plaintiff in the attachment against G. G. Landis, for these cigars, which was dismissed by reason of his minority. He did not call on me; I wrote to him in consequence of that advertisement in the paper." Second assignment of error.

The plaintiff then offered the "York Gazette" containing the advertisement spoken of by the witness, as follows:

"Cigars wanted.—Wanted to buy two million York county cigars. For particulars address,

G. G. Landis,
Lima, Ohio."

Received under objection and exception. Third assignment of error.

The court also admitted in evidence, under objection and exception, the record of the domestic attachment in the court of common pleas of Lancaster county (Kraft v. Landis, Aug. Term, 1887, No. 40). Fourth assignment of error.

The court below charged the jury as follows:

This is an action of replevin. It is brought by A. P. Neff,

the plaintiff, against Jacob R. Landis, the defendant, to recover a quantity of cigars from Mr. Landis, of the different brands you have heard stated in the evidence, which the plaintiff says are his property and are in the possession of Mr. Landis, the defendant.

This action of replevin may be maintained whenever one party claims goods in possession of another party. Weaver v. Lawrence, 1 Dall. 156, 1 L. ed. 79.

In Pennsylvania replevin lies for the property of one in the possession of another, whether the claimant ever had possession of it or not, and whether his property be absolute or qualified, provided he has the right of possession. Harlan v. Harlan, 15 Pa. 507, 53 Am. Dec. 612.

But to maintain replevin the plaintiff must show either a general or special property in him, and the right of possession. Lester v. McDowell, 18 Pa. 91; Lake Shore & M. S. R. Co. v. Ellsey, 85 Pa. 283.

Whenever the owner has not parted with his property he can assert his right as well against an infant as an adult, and maintain detinue, replevin or trover therefor. Penrose v. Curren, 3 Rawle, 351, 24 Am. Dec. 356.

Where goods are sold to an infant on credit, and he avails himself of his infancy to avoid paying for them, the vendor may claim the goods as having never parted with the property in them, unless the infant has parted with them—sold them to a third party for a valuable consideration. 15 Mass. 359.

In the action of replevin a plaintiff must recover, if he recover at all, on the strength of his own title to the property he claims; he cannot recover by reason of the weakness of the title of his adversary. Dannels v. Fitch, 8 Pa. 495; Reinheimer v. Hemingway, 35 Pa. 432.

He must show either a general or a special property in himself, and must also show a right to possession of the property he claims, and that it was in possession of the defendant at the time of the issuing and service of the writ, sheriff's return, when defendant keeps property and gives bond. Lester v. McDowell, 18 Pa. 91; Lake Shore & M. S. R. Co. v. Ellsey, 85 Pa. 283; Cummings v. Gann, 52 Pa. 484.

In this case the defendant has entered the pleas *non cepit* and property; these two pleas may be properly pleaded together. By the plea *non cepit* the defendant avers that he did not take

the property of the plaintiff, and by the plea of property he avers that the property claimed by the plaintiff in this action is his, the defendant's own property, and not the property of the plaintiff, who is here claiming it.

Now it cannot be doubted that a minor who, under such circumstances as you have heard detailed before you, obtains the property of another by pretending to be of full age, and legally responsible, when in fact he is not, is guilty of a fraud by false pretense, for which he would be answerable criminally.

Where a contract is induced by such fraud as does not involve a public wrong, the adjustment of which is not against public policy, it is in general voidable only, not void; and the party defrauded may at his option confirm or repudiate it; the contract only becomes void after it has been avoided; and therefore in the case of a sale of goods induced by the fraud of the vendee, the vendor may, excepting in the cases mentioned, sue in assumpsit for the price, in affirmance of the contract, or in trover or replevin in disaffirmance of it.

But until the vendor has done some act to disaffirm the transaction the property vests in the vendee; and therefore it is that an innocent transferee for value takes the title, even as against the original vendor or owner. The mere fact that the contract may be afterwards rescinded does not affect its intermediate efficiency.

In the case before us there seems to be no doubt, from the whole evidence presented, that the title to the cigars sold and shipped by Neff passed to Landis, who bought them from Neff. The transaction presents all the requisites of a sale, and shows that the manifest design of the parties at the time was to pass the property as well as the possession to G. G. Landis; but if the jury believe from the evidence that the sale by Neff was induced by the artifice and fraud of G. G. Landis, then Neff would have a clear and undoubted right, on discovery of such fraud, to wholly repudiate the contract and proceed by replevin for the recovery and possession of his property, and to recover it also, provided G. G. Landis had not sold or transferred it to some other person bona fide, and for a valuable consideration.

This being the law, the facts are for you. If the jury believe from the whole evidence that G. G. Landis obtained the two cases of cigars from Neff by fraudulent representations and false pretenses; that Jacob R. Landis had knowledge that they

were so obtained; that he took them from G. G. Landis to cover up the fraud and prevent Mr. Neff from recovering his cigars or compensation for them, and did not obtain them from his son, G. G. Landis, as he and his son have testified bona fide, in good faith and for a valuable consideration; and that Neff's cigars were among those obtained by the defendant from his son, the verdict should be for the plaintiff, for the value of the two cases of cigars, with damages for their detention; which in cases like the present would be interest on the value of the goods, from the issuing of the writ of replevin, or the time of a demand for them and a refusal to deliver them.

But if the jury believe from the whole evidence that G. G. Landis did by means of fraud and false pretenses obtain the cigars from Neff, as Neff says he did, and that he subsequently after receiving them in Ohio, and before Neff discovered the fraud, or took any steps to repudiate the contract, sold and delivered the Neff cigars to his father bona fide, in good faith, for a valuable consideration, without any knowledge of such fraud on the part of the father, and received from his father his own note due from him to his father in payment, the verdict must be for defendant.

Or if the jury believe that all the fraud alleged against G. G. Landis by Mr. Neff has been proved by the evidence, and believe that the cigars he bought of Neff were sold and delivered by him to Stroble & Co. at Massillon, Ohio, and that none of Neff's cigars were among those obtained by Jacob R. Landis from G. G. Landis, the verdict must be for the defendant (for in such case the plaintiff cannot recover in this action), with such damages for their detention as is just, which in this case would be interest on the money from the beginning of this suit.

Or if the jury believe that all the fraud alleged against G. G. Landis has been proved, and also believe that the cigars sold by Neff to G. G. Landis were among the cigars obtained by Jacob R. Landis from G. G. Landis, but are satisfied that Jacob R. Landis obtained them from his son, as he and his son say he did, in good faith, for a valuable consideration, and in payment of money actually due and owing by G. G. Landis to him, and that the notes showing such indebtedness were given up by Jacob R. Landis to his son, without any knowledge by the defendant of the alleged fraud on the part of G. G. Landis, and before Neff had taken any steps to repudiate the contract and recover his

cigars, your verdict should be for the defendant, for in such case plaintiff could not recover in this suit.

Fraud must be proved, we would repeat, to the satisfaction of the jury; it is never presumed. The frauds alleged were that G. G. Landis, not of age, alleged that he was of age and had Bender and his father backing him. Were these representations made? If so, were they false? Did his father and Bender back him—was his father not responsible for the newspapers or how many cigars he got in pursuance of them? Is there any evidence to satisfy you that the father knew of any fraud when he got the cigars from his son? Because he didn't appear in the attachment suit you cannot decide against him in this case. He does appear in this suit and claim.

You will remember the evidence as to his giving his son about $800 that spring to go into business. If you believe he did this, had he not a right to expect the cigars he found there were paid for?

Did the father buy the cigars from G. G. Landis, as he says in good faith, at $9 per thousand, to pay the debt of his son to him and give him up the notes he held against him showing his debt to the father?

Did Jacob R. Landis ever get any of Neff's cigars into his possession, or did G. G. Landis sell these cigars to Stroble & Bro. at Masillon, and receive pay from them for these cigars?

You will remember that the father is not liable for contracts of this character made by his son; and that if he loans him money, he would have a right to buy in good faith from him any goods or articles of commerce he had in payment of his debt or claim in the same manner that Neff or any stranger would.

The defendant submitted, *inter alia,* the following point:

"3. Under all the evidence in the cause the verdict should be for the defendant."

Ans. We have stated the law so fully, clearly and fairly that the jury cannot mistake their duty. We, therefore, leave the case with the jury. They will find their verdict in accordance with the law and evidence. First assignment of error.

Verdict and judgment were for the plaintiff, for $162.50.

Brown & Hensel for plaintiff in error.

H. H. McClune and *J. W. Johnson* for defendant in error.

PER CURIAM:

An examination of the evidence convinces us that it presented a case proper for the jury. There is certainly some evidence tending to prove fraud. In the conflict of evidence the jury is the proper tribunal to weigh it and to determine what it proves. We discover no error in the admission of evidence or in the charge.

Judgment affirmed.

Amelia Diehl, now Mrs. Amelia Kress, Plff. in Err., v. Amos Lee.

An agreement in writing to lease a room "by the month at $10 a month payable in advance," the room "to be given over to the same April 1, 1886," is a lease of the premises until April 1, 1886, and not from month to month.

(Argued May 18, 1887. Decided May 30, 1887.)

January Term, 1887, No. 381, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Lancaster County to review a judgment on a verdict for plaintiff in an action of debt for rent. Affirmed.

The *narr.* set out the devise, possession and default in payment, with an additional count for use and occupation. The defendant pleaded *nil debet.* It did not appear by the pleadings that the defendant was a married woman.

The facts appear by the following charge of the court, by PATTERSON, J.:

The action was brought to recover the amount of money alleged by the plaintiff to be a balance of rent owing by this defendant, formerly Amelia Diehl, now Amelia Kress. There is no dispute about her having signed this paper. It is signed by

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NOTE.—A lease at a fixed sum per month without fixing a definite term is one from month to month. Hollis v. Burns, 100 Pa. 206, 45 Am. Rep. 379; Hess's Estate, 2 Woodw. Dec. 339; Wall v. Ullman, 2 Chester Co. Rep. 178. See Brown v. Butler, 4 Phila. 71. But if an annual rent is fixed, though payable by the month, the lease is from year to year. Jones v. Kroll, 116 Pa. 85, 8 Atl. 857.

Amos Lee and Amelia Diehl. There is no dispute about the amount of money to be paid per month, $10. There is no dispute about the fact that she removed from there five months before the 1st of April, after she had remained there seven months and paid $10 a month, and that she then left. It is maintained on the part of the defendant that she had a right to leave when she pleased. I will read this lease.

"I, Amos Lee, of the first part, do hereby agree to lease room 250 West King street by the month at $10 a month, payable in advance, for a millinery store. Store room to be left in good condition, reasonable wear and tear excepted, to be given over to the same, April 1, 1886."

[Now, if this lease was under seal, we would charge you that that seems to imply that the lease should extend to the 1st of April, 1886. I cannot speak of this other paper, because it was not signed; but the testimony of the parties is, from Miss Diehl (Mrs. Kress) herself, that she would not sign the one, because it put it in the power of Amos Lee to terminate her lease at any time at the end of any month, and she would not sign that. This was written then; and you perceive that it fixes the rent per month, and when it shall be paid, in advance, at the beginning of each month. And then it says, "to be left in good condition, reasonable wear and tear excepted; to be given over to the same, April 1, 1886."

The testimony of Maggie Lee is that defendant did not sign the other, because it did not extend the time—because it gave Mr. Lee that power to put her out; so that while it is not under seal, it is therefore capable of being changed by parol testimony. Mrs. Kress says that at the time it was signed, she said she wanted to have the privilege of leaving at the end of any month, and Mr. Lee said: "Well, you pay the rent in advance, and it makes no difference. You can do as you please."

Now, if this was under seal, that testimony would not change the conditions of this lease, when it is contradicted by a witness on the other side. Yet the courts do hold that a lease under seal may be changed by parol, if the testimony is strong enough, and it may be reformed, looking at what was said at the time of signing, and if that induced any one of the parties to sign, although it was not in the written paper. But it is necessary for us to apply that law here. Then, the testimony of Mrs. Kress is denied by Amos Lee and by Mrs. Lee and Miss Maggie

Lee; and although Mrs. Kress said while she was going away, she made this remark about leaving, it was after the lease had been signed, and it would not change the character of the lease after it had been signed; unless it had been assented to by Amos Lee. She said he did assent to it. And Miss Maggie Lee says she was there, and she did not hear anything of that kind said by Mr. Lee. And so Mrs. Lee says. If you look at the preponderance of the evidence, you will have no difficulty on that point.]

Now, it is not disputed that when she came to return the key it was refused to be received. Now, there is such a thing as a landlord giving up his right to recover rent, and that explains the matter in regard to the key and its return at the end of the term, when she said Mr. Lee said: "It is all right." But the evidence here is that he refused to accept it, and that it was thrown upon the steps. Therefore, if it came into the possession of him or his wife in that way, it would not be a yielding up of the conditions of the lease; but if it was proved that a tenant had rented for a whole year, and the tenant should come to the landlord in the middle of the year, and should say to him, "I don't want to keep this property any longer," and gives the key to the landlord, and he accepts it without any objection, that prevents the landlord from recovering the rent for the balance of that year.

But if you believe the testimony, that he refused to take it,—and upon that point Mrs. Kress testified that he would not take it, and when he would not take it she threw it upon the steps, and then it was lifted up afterwards by Mrs. Lee, so as not to be lost,—it would not be an acceptance of the key on the part of Mrs. Lee; and therefore it would not release the tenant from paying the balance of the rent.

The court refused the following point submitted by the defendant:

"Under the pleadings and evidence in this case, the verdict should be in favor of the defendant."

The assignments of error specified: (1) The portion of the charge inclosed in brackets; and (2) the refusal of the point.

John A. Coyle for plaintiff in error.

E. Franklin for defendant in error.

PER CURIAM:

We do not affirm the correctness of the charge as to the different effect of oral evidence in reforming a written agreement not under seal, and one under seal; yet this form of submission worked no injury to the plaintiff in error. She has no cause to complain of the language used.

We think a correct construction of the written lease fixes the 1st of April, 1886, as the time of its termination; and there was no sufficient parol evidence to change its effect.

Judgment affirmed.

Appeal of John F. Griel et al., Exrs.

A mechanics' lien filed against a bone boiling factory, a bone house, a wagon shed, a dwelling and a stable, all situate on a farm of about 3 acres, for labor and materials furnished in the erection of some of the buildings and the repair of the others, all the buildings being intended to be occupied and used together, is good without the apportionment of the claim among the several buildings.

(Argued May 18, 1887. Decided May 30, 1887.)

July Term, 1887, No. 55, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Common Pleas of Lancaster County dismissing exceptions to and confirming the report of an auditor to distribute the proceeds of a sheriff's sale of real estate. Affirmed.

The facts as they appeared before William A. Wilson, Esq.,

Cited in White v. Livingston, 69 App. Div. 376, 75 N. Y. Supp, 466, holding a separate sale of a portion of the premises impracticable.

NOTE.—The general mechanics' lien act of June 4, 1901 (P. L. 431) provides in § 12 that "if the labor or materials be furnished continuously in the erection and construction of, addition to, or removal of, a structure or other improvement, the claimant may file a single claim, though furnished under more than one contract, with the same effect as if furnished continuously under a single contract. A single claim may be filed against more than one structure or other improvement, if they are all intended to form part of one plant. . . . No apportioned claim shall hereafter be allowed, but separate claims, with the amount due determined by apportionment, may be filed as herein set forth."

the auditor appointed by the court below, were stated in his report substantially as follows:

Joseph Stark was the owner of a small tract of hilly and rough land, situated in Lancaster township, on the public road leading from the Philadelphia pike to the Lancaster waterworks. On it were erected a one story frame or log dwelling-house and a stable. In the spring of 1885 he projected a series of improvements upon the premises, including the erection of a bone boiling establishment, or oil factory, a bone house and a wagon shed, extensive alterations and improvements in the dwelling-house, and a new floor in the stable, which were completed during the spring and summer of 1885.

On August 14, 1886, the premises were sold by the sheriff on an execution issued by Jacob Griel, and purchased by him for the sum of $3,000. The first lien was a purchase-money judgment held by Robert Tomlinson, which, with interest thereon and the costs of the execution, amounted to about $1,100. The balance of the amount bid at the sheriff's sale, $1,902.52, was claimed by Jacob Griel as the holder of the second judgment, and his receipt taken for that amount. But his right to the fund under the said judgment was disputed by other lien creditors.

Griel's judgment was entered April 6, 1885, to January term, 1885, No. 1622, in the sum of $4,000. It was given as collateral for indorsements made and to be made, and renewals thereof, etc. The entire amount was due on the judgment.

The mechanics' lien creditors furnished labor and materials for the various new buildings erected and the alterations made in the dwelling-house and stable.

To fix the time when the first work was done upon the bone boiling establishment, the principal erection in the series of improvements, Joseph Stark testified that the work of staking it off was done March 26, 1885; that the digging of the cellar was commenced the next day; that he paid the workmen the first time April 4, 1885. Up to that time each had worked four days. The next payment to workmen was made April 11; and the next on April 18. Afterwards, other men were employed, and payments made April 25, May 2, May 16, and May 30.

This testimony was corroborated.

On the other hand, a number of witnesses were called to prove that the first work done on the bone boiling establishment was after April 6, 1885, the date of the Griel judgment.

On the whole, after careful consideration of the testimony given, including the contemporaneous memoranda in pass books, your auditor believes the evidence to preponderate in favor of the view that the main erection in the series of improvements made by Joseph Stark on the premises in question was commenced on March 27, 1885, and that the work was regularly continued, until that and the subsidiary buildings and alterations were completed. And he finds such to be the fact.

By the provisions of the act of 1836 a mechanics' lien for work and materials is preferred to every other lien which attaches subsequently to the commencement of the building.

In Pennock v. Hooker, 5 Rawle, 291, it is held that the commencement of a building is the first labor done on the ground which is made the foundation of the building.

It follows, therefore, that the mechanics' lien creditors are entitled to precedence over the judgment of Jacob Griel, if their claims are established as required by law.

Baumgardner, Eberman, & Company filed a lien against the premises on August 19, 1885, in the sum of $538.06, for lumber and materials furnished to the different buildings on the premises. The items ran from May 11 to June 15, 1885, and were used indiscriminately upon all the improvements. The lien filed is a joint one against the bone boiling establishment, the bone house and the wagon shed, for materials furnished in their erection and construction, and for the repair and alteration of the dwelling-house and stable. The articles were furnished upon the credit of these buildings, and used in their construction and repair. In such a case as this a joint lien need not be apportioned.

In Lauman's Appeal, 8 Pa. 473, it is held that a claim filed against a mansion house, barn, wagon house, etc., on one farm to which they are all appurtenant, and are intended to be occupied and used together, is good without apportionment of the claim among the several buildings.

In Moore v. Forrest Mansion Hotel Co. 3 W. N. C. 289, it is held that a joint lien may be filed for materials furnished for the erection of a new building and the repair of an old one.

The claim is allowed.

Frederick Hoefel filed a lien on August 20, 1885, in the sum of $300.33; the balance due on the same is $265. He was superintendent and builder, and also did carpenter work upon

all the buildings and improvements. The bill of items runs from April 22 to June 19. This lien like the former is a joint lien upon all the new erections and the buildings altered and repaired.

While a mere superintendent has no lien, yet one who performs services has. Bank of Pennsylvania v. Gries, 35 Pa. 423.

The claim is allowed.

Jno. Best & Son filed a lien August 5, 1885, in the sum of $73.68 for an iron tank, and other machinery used in the bone boiling business. The bill of items was from May 23 to July 18. This lien was filed against the principal construction, the bone boiling establishment, and the machinery and labor furnished went into that building.

The claim was fully proved, and is allowed.

J. W. Keller filed a lien August 12, 1885, in the sum of $19.41, for tinware and spouting furnished between May 26 and July 13, 1885. The lien was filed against the bone boiling establishment, and the work and materials went into the same.

The claim was fully proved, and is allowed.

W. D. Sprecher & Son filed a lien August 12, 1885, for iron pipe, terra-cotta pipe, cement, plaster, etc. One item, admitted not to be lienable, being struck out, the balance due is $89.10. This lien is filed against the bone boiling establishment, and the articles were furnished for that building. The bill of items runs from April 27 to June 25. The iron pipe and terra-cotta pipe was mainly used in connecting the pump in the building with the creek. Water was pumped into the building through the iron pipe, and the refuse ran into the creek through the terra-cotta pipe. We think the pump and its attachments a necessary part of the machinery for the bone boiling establishment, although a portion of the same extends beyond the confines of the building.

The lien was fully proved, and is allowed.

Pontz & Brother filed a lien August 13, 1885, in the sum of $64.37, for brick furnished the bone boiling establishment. The bill of items was from May 13 to June 2. The bricks were furnished for that building, and used in its construction.

The claim is fully proved, and is allowed.

J. P. Stormfeltz filed a lien September 2, 1885, in the sum

of $54.32, for woodwork, shutters, sash, etc. It is a joint lien against all the buildings and alterations. The evidence shows that the articles were furnished upon the credit of the buildings and went into their construction and repair.

The claim is allowed.

Moore, Williams, & Company filed a lien October 16, 1885, against the bone boiling establishment, in the sum of $183.12 for an elevator from the cellar to the first story. It was furnished by contract with Stark, and was part of the machinery of the establishment.

The claim was fully made out, and is allowed.

C. Ludy & Son filed a lien for a boiler and tank, May 7, 1885, furnished the bone boiling establishment, in the sum of $430. Mr. Stark sent his check for the amount, but it was returned protested.

The claim is fully proved, and is allowed.

M. H. Wenger filed a lien December 1, 1885, in the sum of $26, for lime furnished upon the credit of the buildings between April 6, 1885, and June 1, 1885. This lien was filed on the last day allowed by law. The lime was used upon the premises.

The lien is allowed.

The fund, after deducting costs of audit, will not be quite sufficient to pay interest on all the liens to the date of the sheriff's sale. It will therefore be distributed *pro rata* among the respective claimants.

(Then followed a table of distribution.)

To this report the executors of Jacob Griel, plaintiffs below, filed exceptions which specified the action of the auditor: (1) In finding as a fact that work on the erection of the bone boiling factory was commenced prior to the entry of judgment of Jacob Griel; (2) in allowing the mechanics' liens, as prior to the Griel judgment; and (3) in allowing liens not apportioned.

Upon dismissing the exceptions and confirming the report, LIVINGSTON, P. J., delivered the following opinion:

In this case the learned auditor, after a close scrutiny and careful and impartial examination of the evidence presented to him and returned to the court, has found the fact to be that the work was commenced on the buildings against which the mechanics' liens were filed, in the month of March,—on March 27, 1885,

—several days prior to the entry of the Jacob Griel judgment, on April 6, 1885; and that, by reason thereof, the mechanics' liens, which he finds were all valid liens and established by proper evidence, are entitled to precedence in the distribution of the fund; and he has distributed the balance among them. We have examined the report, the testimony, and authorities cited, and are unable to see any sufficient reason to change or disturb the finding of facts and distribution reported by the auditor.

We therefore overrule and dismiss the exceptions, and confirm absolutely the report of the auditor.

The assignments of error specified the action of the court below: (1) In overruling exceptions and confirming the report of the auditor in finding that work was commenced on the buildings on March 25, 1885, and in saying that "by reason thereof the mechanics' liens, which he finds were all valid liens and established by proper evidence, are entitled to precedence in the distribution of the fund;" and (2) in dismissing the exceptions to the auditor's report, *viz.*, "Auditor erred in allowing liens not apportioned," said liens being those of Baumgardner, Eberman & Co., Frederick Hoefel, and J. P. Stormfeltz.

A. C. Reinoehl, for appellants.—The language of § 13 of act of June 16, 1836, is imperative; and in addition to the penalty of postponement of unapportioned mechanics' liens to other liens, courts have stricken off mechanics' liens entirely. Boas v. Birmingham, 2 Pearson (Pa.) 334; Mersereau v. Kohler, 2 Pearson (Pa.) 119; Bunting's Appeal, 6 W. N. C. 12; Wharton Bros. v. Douglas, 92 Pa. 66; Girard Point Storage Co. v. Southwark Foundry Co. 105 Pa. 248.

W. A. Atlee, W. T. Brown, B. C. Kready, B. F. Davis, B. F. Eshleman, D. McMullen, W. M. Franklin, and *T. Whitson*, for appellees.—The auditor decided that March 27 was the time of commencement of the work, and therefore the mechanics' liens were in time. Pennock v. Hoover, 5 Rawle, 291.

A case like the present is not within the contemplation of the framers of the law. It consequently remains subject only to the prior statutes, which do not imperatively call for an apportionment. Lauman's Appeal, 8 Pa. 473.

If it is in fact true that all this is but a proper curtilage of the buildings against which the lien is filed, then will that lien cover it? Girard Point Storage Co. v. Southwark Foundry Co. 105 Pa. 248.

In Moore v. Forrest Mansion Hotel Co. 3 W. N. C. 289, a lien exactly like this was upheld.

The act of 1856 extended the provisions of the act of June 16, 1836, and its supplements, "as fully as the same are now applicable to buildings, to every steam-engine, coal breaker, or parts thereof, pump-gearing, hoisting-gearing, fixture or machinery, in and about mills of any kind, iron or coal works, coal mines and iron mines." Johnson, Mechanics' Lien Law, 43, 63; Gray v. Holdship, 17 Serg. & R. 413, 17 Am. Dec. 680; Morgan v. Arthurs, 3 Watts, 140; Wademan v. Thorp, 5 Watts, 115; Summerville v. Wann, 37 Pa. 182; Esterley's Appeal, 54 Pa. 192; Parrish's Appeal, 83 Pa. 111.

The test of what materials come within the act of 1836 is whether they are a part of the original erection and necessary for the purposes for which the building was intended. Dimmick v. Cook Co. 115 Pa. 573, 8 Atl. 627.

Lumber for shelves for a vault, which forms part of the original plan of the building, is a proper subject of a lien under the act of 1836. Harker v. Conrad, 12 Serg. & R. 303, 14 Am. Dec. 691.

The same is decided regarding bricks for a pavement. Yearsley v. Flanigen, 22 Pa. 489.

PER CURIAM:

The auditor and court concurred in the finding of facts. The evidence was conflicting, but we are not able to say that their conclusion is not correct. Under the facts the rule requiring the lien to be apportioned is not applicable to this case.

Decree affirmed and appeal dismissed, at the costs of the appellants.

Appeal of W. W. Hopkins, Trustee, Amos S. Henderson's Estate.

Where there is a failure to trace trust funds into any specific property

NOTE.—Similar determinations are found in Lebanon Trust & S. D. Bank's Estate, 166 Pa. 622, 31 Atl. 334, and Freiberg v. Stoddard, 161 Pa.

of the trustee, they are not entitled to priority of payment over the claims of other creditors, although the trustee may have continued to pay interest on the securities in the form in which they originally came into his hands.

(Argued May 19, 1887. Decided May 30, 1887.)

January Term, 1887, No. 398, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from the Orphans' Court of Lancaster County dismissing exceptions to the report of an auditor distributing the estate of a decedent and disallowing the claim of the appellant as a preferred claim. Affirmed.

The auditor reported as follows, upon the contention of this appeal:

W. W. Hopkins, trustee under the will of Dorothea Brien, deceased, presented a preferred claim of $13,267.50, with interest from February 6, 1886. Dorothea Brien died testate on August 21, 1862. August 28, 1862, her last will and codicil thereto were duly proved before the register of Lancaster county, and letters testamentary granted to Amos S. Henderson, who was appointed executor in said codicil. September 11, 1862, Mr. Henderson, as executor, filed in the register's office an inventory and appraisement of the goods and chattels, rights and credits, which were of Dorothea Brien, at the time of her decease, amounting altogether to $16,033.16. Mr. Henderson never filed an account in this estate.

John D. Skiles, administrator of Amos S. Henderson, deceased, who was executor of the last will and testament of Dorothea Brien, deceased, filed an account April 24, 1885,

259, 28 Atl. 1111. So, in Cross's Appeal, 97 Pa. 471, it was held that no resulting trust in land would arise from the mere fact that the owner of the land uses trust funds in its improvement.

In Cross's Appeal, 97 Pa. 471, 1 Chester Co. Rep. 221, the auditor found as a fact that the guardian used his ward's money in improving his land and in building a house, etc., and that the guardian thought such use of the trust money was safer than investing it in stocks. The supreme court held, Sharswood, J., dissenting, that the proceeds of the sale of such real estate by the assignee for the benefit of creditors of the trustee were not impressed with a resulting trust for the trust moneys so used.

A resulting trust in lands, in Pennsylvania, must arise, if at all, at the inception of the title. Barnet v. Dougherty, 32 Pa. 371.

It was held, also, in Cross's Appeal, that the *cestui que trust* had no lien on the land, arising from the equitable circumstances of the case.

showing a balance, due the estate of Dorothea Brien, in the account of $13,843.

Exceptions to this account were filed by D. G. Eshleman and S. H. Reynolds, attorneys for the trustee of Dorothea Brien, deceased. The court appointed Simon P. Eby, Esq., auditor, to pass on said exceptions, whose report was duly confirmed nisi by the court on February 6, 1886, fixing the balance due from the estate of Amos S. Henderson to the estate of Dorothea Brien, deceased, of $13,267.50. This balance does not include two notes of $1,500 which were earmarked and found among the effects of the estate of Mr. Henderson by his administrator, John D. Skiles, and by him previously handed to W. W. Hopkins, the new trustee of the Brien estate.

No money or other security than these two notes was found anywhere that could be identified as belonging to the estate of Dorothea Brien, deceased, since the death of Amos S. Henderson.

These two notes of $1,500 are not embraced in the inventory or account of Mr. Skiles, as administrator of Amos S. Henderson, deceased.

A paper in the handwriting of Mr. Henderson was offered in evidence by W. W. Hopkins, trustee, of which the following is a copy:

Securities held by A. S. Henderson, Exr., for the estate of Mrs. Brien, April 1, 1876.

U. S. bonds	4,000
Reinoehl judgment	4,000
Camden & Amboy bonds	2,000
Atlee notes	1,000
Wiley judgment	500
Ferguson judgment	500
	$13,000

Twenty-seven shares Pennsylvania railroad, worth over $1,500.

At the time of Mr. Henderson's death none of these securities, nor those mentioned in the inventory and appraisement, were found among his effects; nor could the proceeds thereof be traced or identified.

The will of Dorothea Brien directs the payment of her "just debts, funeral and other expenses," then gives, devises, and bequeaths "the rents, incomes, and interest of the net residue and remainder of her estate, real, personal, and mixed, whatsoever and wheresoever, to her daughter, Sarah B. Rogers, for her sole and separate use during her natural life."

At the decease of her daughter she gives and bequeaths the "said residue and remainder" to all the children of her said daughter then living and "to the child or children of any of them dead, their heirs and assigns, *per stirpes,* in equal shares and parts."

Mrs. Rogers, as appears from two bank books offered in evidence, kept her bank account with Reed & Henderson since October 30, 1874, until Mr. Reed died, and then continued her bank account with Mr. Henderson.

Her bank book with Mr. Henderson shows, in the handwriting of Mr. Henderson, the following entries:

1882, Dec. 6, Camden & Amboy	$60.00
1882, Dec. 6, P. R. dividend	33.75
1882, Dec. 6, R. scrip	31.86
1883, June 14, Penna. dividend	27.00
1883, June 14, C. & A. coupon	60.00

A large number of other debits and credits appear in these bank books. The last entry in Mrs. Rogers's bank book is,

1885, Feb. 7, to balance $300.88

In these bank books it appears that Mrs. Rogers deposited her other money besides the income she received from her mother's estate through Mr. Henderson, who was the executor.

These bank books and the paper dated April 1, 1876, in Mr. Henderson's handwriting, of which a copy is given, were before the auditor, Simon P. Eby, Esq., who passed on the exceptions. But the counsel did not have this paper dated April 1, 1876, when they stated the account of John D. Skiles in the Dorothea Brien estate.

There were not found among the effects of Mr. Henderson's estate any Camden & Amboy coupon or registered bonds; any certificates of P. R. R. stock; any bonds or stock of the P. R. R. Company; any bonds or stock of the Camden & Amboy Railroad Company, in the name of Dorothea

Brien, or in the name of A. S. Henderson as executor of the estate of Dorothea Brien, or in the name of A. S. Henderson as executor or trustee, nor any of the proceeds of any such bonds or stock in the account of Mr. Skiles as administrator of Mr. Henderson.

The auditor finds as a fact that the trust money of $13,267.50, the proceeds of converted securities, has passed into currency without a trace of identification.

The claim of $13,267.50, presented as preferred, by Mr. Hopkins, trustee under the will of Dorothea Brien, deceased, is only allowed a dividend with the general creditors.

Mr. Henderson, executor of the will of Mrs. Brien, came into possession of certain trust funds and securities of her estate. At the time of his death two notes, amounting to $1,500, which were earmarked, were the only property among his effects which could be identified as belonging to the trust. These two notes were handed over to Mr. Hopkins, who became Mr. Henderson's successor in the trust.

There is no trace which leads to an identification of the balance of the trust estate, and the inference is that Mr. Henderson has tortiously converted the trust securities and appropriated the proceeds to his own use.

It does not appear definitely when he appropriated the proceeds to his own use; it does not appear definitely when he appropriated this $13,267.50. The bank books contain no entries on the subject. It does not appear that he put the money into his bank, although he may have. Whatever particular disposition he may have made of this trust money, there can be no doubt that it has passed into currency and by its circulation became engulfed in the commercial interests of the community. The legal principles which govern this claim are recognized in Thompson's Appeal, 22 Pa. 16.

Whenever a trust fund has been wrongfully converted into another species of property, if its identity can be traced, it will be held in its new form liable to the rights of the *cestui que trust,* which attach to it until detached by the superior equity of a bona fide purchaser for a valuable consideration without notice. But the right of pursuing it fails when the means of ascertainment fail. This is always the case when the subject-matter is turned into money and mixed and confounded in a

general mass of property of the same description. Story, Eq. §§ 1257–1259.

"An earmark is not indispensable to enable a real owner to assert his right to property or to its product or substitute. Evidence of substantial identity may be attached to the thing itself or it may be extraneous. It is freely admitted that if a trustee or agent receive money of a *cestui que trust* or principal, and mingle it with his own so that it cannot be followed, the *cestui que trust* cannot recover it specifically. This is not because the ownership is changed, but because a court cannot lay hold of the property as that of the owner." Farmers' & M. Nat. Bank v. King, 57 Pa. 208, 98 Am. Dec. 215.

Lord MANSFIELD said: "It has been quaintly said 'that the reason why money cannot be followed is because it has no earmark.' But this is not true. The true reason is, upon account of the currency of it, it cannot be recovered after it has passed in currency. So, in case of money stolen, the true owner cannot recover it after it has been paid away fairly and honestly upon a valuable and bona fide consideration; but before money has passed into currency an action may be brought for the money itself. . . . Apply this to case of a bank note; an action may lie against the finder, 'tis true, . . . but not after it has been paid away in currency." [Miller v. Race, 1 Burr. 457.]

Lord ELLENBOROUGH observes: "The product of or substitute for the original thing still follows the nature of the thing itself, as long as it can be ascertained to be such. And the right only ceases when the means of ascertainment fail, which is the case when the subject is turned into money, and mixed and confounded in a general mass of the same description." [Taylor v. Plumer, 3 Maule & S. 575.]

The *cestui que trust* in the Brien estate is in no worse position than any other of the general creditors; and she is entitled to her dividend, which is awarded in this distribution upon the legal principles above stated.

Exceptions were filed by W. W. Hopkins, executor, that his claim was not allowed in full, which were dismissed by the court; and the report was confirmed absolutely.

The assignments of error specified: (1) The dismissal of the exceptions; and (2) the confirmance of the report.

D. G. Eshleman and *S. H. Reynolds,* for appellant.—In Hallett's Estate, L. R. 13 Ch. Div. 696, a fund, originally a trust fund, was followed into certain bonds, in which it had been invested by Hallett, and the proceeds of other securities which he held as agent were followed into his bank account; both funds were recovered by their beneficial owner.

"We may here put the case of trust money mixed in the same heap with the trustee's money. It may be said that the trust money has, like water, run into the general mass and become amalgamated, and therefore the *cestui que trust* has no lien. But clearly this cannot be maintained; for suppose a trustee, partly with his own money and partly out of the trust fund, to have purchased an estate. It cannot be predicated of any particular part of the estate that it was purchased with the *cestui que trust's* money, and yet the *cestui que trust* has a lien upon the whole for the amount that was misemployed. And it follows in the other case that though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust in the general heap, the *cestui que trust* is entitled to take so much out." Lewin, Tr. *759; Pennell v. Deffell, 4 De G. M. & G. 372; Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215.

In Frith v. Cartland, 2 Hem. & M. 417, a person received from plaintiff certain acceptances for a special purpose. He got them cashed and ran away. After mingling the money with his own and making various changes and transformations, he was arrested, and it was held that the plaintiff was entitled to the money in preference to creditors.

In People v. City Bank, 96 N. Y. 32, the bank received from a depositor checks for the payment of two notes formerly discounted by them, and then charged said checks to his general account and soon thereafter failed. The bank in fact did not have the notes, but had sold them to a third party and recovered the proceeds before the checks above named were drawn, and of these facts the depositor was ignorant. The receiver of the bank was ordered, on application of the depositor, to pay him the full amount of the notes out of the general assets of the bank in his hands, on the ground that the bank was a trustee in the matter of the checks, and the proceeds of the notes belonged in equity to the depositors, and though specific identification was impossible, the general assets in the hands of the

receiver were *pro tanto* impressed with a trust in favor of the depositor.

In Peak v. Ellicott, 30 Kan. 156, 46 Am. Rep. 90, 1 Pac. 499, money had been paid to a bank for the particular purpose of paying a note, supposed to have been held by it, but which was in fact held by another bank. The bank which had received the money failed to pay the note and then became insolvent; and the general fund in the hands of the assignee of the bank was held to be impressed with a trust *pro tanto*.

In McLeod v. Evans, 66 Wis. 401, 57 Am. Rep. 287, 28 N. W. 173, 214, McLeod deposited with H, a banker, for collection a draft on New York, which H was to send there for collection. He in fact sent it to a Chicago bank which gave him credit therefor, and H drew against it until it was exhausted, and afterwards suspended business. His assignee received only a small amount of money, but collected other assets and converted them into money, and McLeod sued him for the full amount of the draft. It was held that H having used the proceeds of the draft, either to pay off his debts or to increase his assets, they were somewhere in the assets conveyed to the assignee, so that they were traced into the estate in his hands, which was *pro tanto* impressed with the trust.

The auditor overlooked the fact that modern equity follows trust funds further than did such chancellors as Lords Mansfield and Ellenborough, who seem to have been followed by Lewis, J., in Thompson's Appeal, 22 Pa. 16. He quotes Strong, J., in Farmers' & M. Nat. Bank v. King, 57 Pa. 202, 208, 98 Am. Dec. 215, in support of his views; but he has, unwittingly, no doubt, done that distinguished judge the injustice of not reading his whole opinion.

Hallett's Estate, L. R. 13 Ch. Div. 696, criticises the language of Lord Ellenborough in Taylor v. Plumer, 3 Maule & S. 562, which was adopted in Thompson's Appeal.

H. M. North and *W. R. Wilson,* for appellee.—The fund for distribution, from whatsoever source derived, constitutes part of the decedent's estate. McClintock's Appeal, 29 Pa. 360; Abbott v. Reeves, 49 Pa. 494, 88 Am. Dec. 510; McCandless's Estate, 61 Pa. 9–11.

The finding of the auditor, being affirmed by the court below,

will not be disturbed unless for manifest error. Roddy's Appeal, 99 Pa. 10.

What is the law arising on the facts found? This is not answered by any inquiry into the law of England or of other states of the Union. But the question is: What is the law of Pennsylvania?

Appellant's counsel concede that Thompson's Appeal, 22 Pa. 16, is on all fours with the case in hand and is against their position; but seem to argue that since the time it was decided, 1853, the principles of equity controlling this case have undergone a change. That the auditor and court below in their decision are well fortified, even by the textwriters, abundantly appears by reference to Story's Equity, §§ 1257–1259; Perry, Trs., § 128; Hill, Trustees, *531, top pages 828, 829.

Thompson's Appeal, instead of being weakened, seems to have been strengthened by time. Peoples' Bank's Appeal, 93 Pa. 107, 39 Am. Rep. 728; Williams's Appeal, 101 Pa. 481.

Where an administrator mixes the trust funds with his own and fails, the creditors of the estate have no preference over the individual creditors. Cunningham's Estate, 2 Am. L. Reg. 120.

If this Brien trust money was, at the time of decedent's death, so distinct from the mass of his other property as to be identified, then it is not now and never was a part of decedent's estate, and should not have been included in inventory and account; but the account as it was confirmed by the orphan's court stamps every dollar of the balance as the estate of decedent, and as such it must be distributed; and the act of assembly regulates the order by which it is to be done. Act of February 24, 1834; Wylie's Appeal, 92 Pa. 196; Jefferis's Appeal, 33 Pa. 39.

Per Curiam:

This decree is clearly right. The attempt to compel the payment of the claim of the appellant in full, to the prejudice of the other creditors, is unwarranted under the evidence. There is an entire failure to trace the money of the testatrix into any specific property left by Mr. Henderson.

Decree affirmed and appeal dismissed, at the costs of the appellant.

Appeals of William Loughlin et al., Board of Revision of Taxes, Assessors of Taxes, and Receiver of Taxes of Philadelphia County.

The acts of June 7, 1879, June 10, 1881, and June 30, 1885, do not impose a state tax on mortgages owned by corporations.

It is a matter of the gravest doubt whether the acts of April 29, 1844, and April 22, 1846, so far as they relate to the taxation of mortgages in the hands of corporations are not repealed by the acts of 1879 and 1885.

It is not the proper function of the judiciary to impose taxation (which is a species of confiscation) by a strained construction of doubtful legislation.

The assessment and collection of a tax not distinctly authorized by statute will, therefore, be restrained by injunction.

(Mr. Justice STERRETT dissents.)

(Argued April 4, 1887. Decided May 30, 1887.)

January Term, 1887, Nos. 170, 185–204, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeals from decrees of the several Courts of Common Pleas of Philadelphia County enjoining the assessment and collection of taxes upon mortgages held and owned by twenty-one corporations of the City of Philadelphia. Affirmed.

These were bills in equity filed by the twenty-one following corporations, *viz.:*

Guarantee Trust & S. D. Co.; Delaware Mut. Saf. Ins. Co.; Girard Life Insurance, Annuity & Trust Co.; Penna. Co. for Insurances, etc.; American Fire Ins. Co.; Provident Life & Trust Co.; Fidelity Ins., Trust & S. D. Co.; Philadelphia Trust, etc. Co.; Spring Garden F. Ins. Co.; Ins. Co. of N. A.; Penna. Fire Ins. Co.; Mechanics Ins. Co.; United Firemen's Ins. Co.; Fire Ins. Co. for County of Phila.; Lumbermen's Ins. Co.; Fire Association; Western Sav. Fund Society of Phila.; Phila. Sav. Fund Society; Beneficial Sav. F. Society; Philadelphia Sav. F. Society; and Penn Mutual L. Ins. Co.

In several of the cases preliminary injunctions were granted in the courts below, and this action, reported below in Guarantee

Trust Co. v. Loughlin, 2 Pa. Co. Ct. 591, and Delaware Mut. Safety Ins. Co. v. Loughlin, 2 Pa. Co. Ct. 600, was affirmed on appeal in Hunter's Appeal, 18 W. N. C. 411.

In each case a demurrer or answer was then filed.

One case in which an answer was filed, *viz.*, Girard Life Ins. etc., Co. v. Loughlin et al. C. P. 2, December Term, 1883, No. 417, was referred to Samuel W. Pennypacker, Esq., as master, who reported as follows:

The bill sets out those parts which are material, as follows:

1. The complainant is a corporation duly incorporated by act of assembly of the commonwealth of Pennsylvania, dated the 17th day of March, 1836, and by various supplements thereto, approved February 16, 1855, and March 22, 1870, for the purpose of making and effecting insurances on lives of whatsoever sort or nature, to contract for, grant, and sell annuities and reversionary payments, to take, receive, and hold all estates and property, real and personal, which may be granted, committed, transferred, or conveyed to it, with its consent, upon any trust or trusts whatsoever, at any time or times, by any person or persons, body or bodies corporate, or by any court of the United States, or of the commonwealth of Pennsylvania, and to administer, fulfil, and discharge the duties of such trusts, and to receive all sums of moneys which shall be deposited with the said corporation, on such terms of interest and repayment as shall from time to time be agreed upon and prescribed by the board of managers of the said corporation, not exceeding the legal rate of interest; Provided, That it shall not be enabled to invest any portions of its funds in the discount of promissory notes or bills of exchange, and shall issue no notes or bills of credit or promissory notes in the nature of bank notes, or exercise any banking privileges whatever.

2. That it is also authorized to accept and execute the office or appointment of executor or administrator of any kind and nature whatever, whether such office or appointment is conferred or made by any person or persons, or by any register of wills, or by any orphans' or other courts, either of the United States or of this commonwealth.

3. That its authorized capital is $450,000, divided into 18,000 shares of $25 each.

4. That in pursuance of its powers, it receives from time to time money on deposit at interest, which it invests according to law.

5. That its capital stock and its reserve fund, which is large, are to a considerable extent invested in loans, stocks, and securities authorized by law.

6. That the dividends upon its capital stock for some time has exceeded 6 per cent per annum upon its par value, and it has made returns in accordance with law in each and every year, of the amount of said dividend, and have been assessed and taxed at the rate fixed by law upon its capital stock for each 1 per cent of dividend so made and declared. All taxes due by them had been duly returned, assessed, and paid.

7. That the defendants, William Loughlin, George W. Fairman, and Simon Gratz compose the board of revision of taxes of the city of Philadelphia.

8. That the defendants, James D. Keiser and Albert A. Dunton, are assessors of the eighth ward of said city, in which the office of complainant is located.

13. That it is informed and believes, and therefore avers, that it is the intention of said assessors, under the instruction of said board of revision, to return to the latter, as liable for taxation, a certain round sum guessed at or estimated by them as representing the value of the following assets to complainant belonging,—*viz.*, all mortgages, money owing by solvent debtors, whether by promissory note, penal or single bill, bond or judgment; also all articles of agreement and accounts bearing interest; also all shares of stock in any bank, banking or saving institution or company, and all public loans or stocks whatsoever, except those issued by this commonwealth or the United States, and all money loaned or invested on interest in any other state, and all other moneyed capital.

14. That being advised by counsel that it is not liable to be assessed upon any of the above-described assets, or to be taxed therefor, it has refused to make any return thereof, fearing that such return would be an admission of liability, which it disclaims; but if it be decreed by the court that it is thus liable, it is ready and willing to make the fullest return of all said assets.

15. That it is advised by counsel that the said board of revision is authorized, in case of said return by the said assessors,

to add to the amount thus returned an amount equal to 50 per cent thereon, and to proceed thereafter to levy a tax upon the whole amount thereof; and it fears that unless restrained, the said board of revision must add said penalty.

16. That it is advised that upon the return to the said board of revision of the returns thus intended to be made by the said assessors, it will become the duty of said board of revision to make return to the board of revenue commissioners of the state of Pennsylvania of the amount thereof, together with that of said penalty; and it avers that it is the intention of the said board of revision to do so, and that thereupon the city of Philadelphia will be required to account to the commonwealth, and to pay to its treasurer the tax upon the said amount.

17. That it is advised that upon the making of said return by the said board of revision to said board of revenue commissioners it will become the duty of the former to assess upon, and collect from, it a tax at the rate of four mills upon the amount thereof; and it avers that, unless restrained, the said board of revision will issue a precept compelling it, under penalty of levy and distress, to pay said tax.

18. That by virtue of said returns and assessments of the said assessors and of said board of revision, it will be exposed to litigation, and its property will be liable to levy, and it will be subjected to great and irremediable loss.

19. That it is advised by counsel, and therefore avers, that the returns it has heretofore made fully comply with all the requirements imposed upon it by law; and it avers that it has paid all taxes for which it is liable. It is advised by counsel, and therefore avers, that it is not its duty to make any return of the subject matters of taxation above specified, and that it is not liable to pay any taxes thereon other than those which have already been paid in the manner above specified.

The bill prayed for relief as follows:

a. An injunction, special until hearing and perpetual thereafter, restraining James D. Keiser and Albert A. Dunton, assessors as aforesaid, from making any assessment upon complainant by virtue of its ownership of any of the assets specified in ¶ 13 of the bill, and from making any returns to the said board of revision of such assessment or of any estimated valuation of said assets.

b. An injunction, special until hearing and perpetual there-

after, restraining the said William Loughlin, George W. Fairman, and Simon Gratz, constituting the board of revision of taxes of the city of Philadelphia, and each and every of them, from adding 50 per cent to the amount of any return heretofore made, or which may hereafter be made by the said assessors, of the valuation of said assets to complainant belonging, specified in the thirteenth paragraph of the bill.

c. An injunction against the said Loughlin, Fairman, and Gratz, constituting said board, special until hearing and perpetual thereafter, restraining them from making any return to the board of revenue commissioners of the state of Pennsylvania of any assets specified in said paragraph of the said bill to complainants belonging, or any valuation thereof.

d. An injunction against said Loughlin, Fairman, and Gratz, constituting said board, special until hearing and perpetual thereafter, restraining them from levying any tax upon complainants by virtue of its ownership of any of said assets specified in said paragraph of the bill.

e. A decree that complainant is not liable to make any returns to the said assessors, or to said board of revision, of any of the assets specified in said paragraph of the bill, and that none of said assets so owned by it are liable to taxation under the provisions of § 17 of the act of the 7th of June, 1879, or of § 1 of the act of the 10th of June, 1881

f. General relief.

To this bill the defendants answered as to part, and demurred as to part. The demurrer has since been withdrawn of record. Upon the hearing before the master all of the facts alleged in the bill were formally admitted by defendants to be true, except those denied in ¶ 3 of the answer, which is as follows:

"That they deny the last allegation in the sixth paragraph and the first allegation in ¶ 19 of said bill, and on the contrary aver that from the sworn report made by the plaintiff to the insurance commissioner, in accordance with the laws of this commonwealth, of the property and assets owned by it at the close of the year 1883, it appears, and defendants therefore aver, that the said company owned at that time personal property of the classes enumerated in § 17 of the act of June 7, 1879, entitled 'An Act to Provide Revenue by Taxation,' and in § 1 of the supplement thereto, approved the 10th day of June, 1881, to the amount of $1,687,818.16 exclusive of $337,755.71 in bank,

which, at the rate of four mills, would yield a tax of $6,751.27, which tax, owing to the preliminary injunction granted in this case, has not been returned, assessed, or paid; that the value of the real estate owned by it is $1,550,261.25, and that the amount of personal property owned by it not included within the enumeration of the above-mentioned acts is $37,066.73; that the dividends actually paid by it amounted to $45,000 or 10 per cent on its capital, and it therefore was liable to pay a tax for the year 1884 of 5 mills on its nominal capital, or $2,250, which amount defendants are informed and believe, and therefore aver, has been paid; that the construction of the act under which plaintiff claims that, by the payment of the said so-called capital stock tax, it is exempt from the payment of the 4-mill tax upon personal property, would result in requiring plaintiff to pay a much lower rate of tax than individual citizens are required by said act to pay on their personal property; that the total amount of the so-called capital stock tax paid in 1884 by all the corporations of the state, which made, to the auditor general and insurance commissioner, the sworn returns required by law to be made for the information of the legislature, was equal to only about 1 mill on the dollar of the aggregate amount of their mortgages and other personal property enumerated in the first section of said act of June 10, 1881, upon which classes of personal property individuals are required to pay a tax of four mills on the dollar."

The master finds as a fact that the dividends declared and paid by complainant for a number of years have exceeded 6 per cent per annum upon the par value of the capital stock; that it has made returns in each of said years of the amount of the dividends and has been assessed and taxed at the rate fixed by law upon its capital stock for each 1 per cent of the dividends it has made and declared. These taxes it has paid, including those for the year 1883, which amounted to $2,250.

The sole inquiry under the pleadings, therefore, is whether these are all of the taxes assessable upon and payable by the complainant, or whether it is liable under § 17 of the act of June 7, 1879, and § 1 of the supplementary act of June 10, 1881, to pay in addition a tax upon the subjects enumerated in these sections.

Counsel for the defendants offered in evidence before the master "Eleventh Annual Report of the Insurance Commission-

er of the State of Pennsylvania. Part II. Life & Accident Insurance," "Eleventh Annual Report of the Insurance Commissioner of the State of Pennsylvania. Part I. Fire & Marine Insurance," "Report of the Auditor General on the Finances of the Commonwealth of Pennsylvania for the Year Ending November 30, 1884," "Reports of the Several Banks and Savings Institutions and Banks Organized under the Free Banking Law of Pennsylvania, Communicated by the Auditor General to the Legislature, January 1, 1884." He also offered in evidence schedules showing the results of an analysis of these reports.

Counsel for the complainant waived all objections of form with reference to these reports and schedules; and it was agreed before the master that they should be treated with the same force and effect as though the original books and reports of the companies therein referred to had been offered. He objected, however, to the offer of each of these reports and schedules, in so far as they gave facts concerning companies other than the complainant, upon the ground of irrelevancy.

The purposes of these offers was to show that the taxes paid by corporations, under the provisions of § 4 of the act of 1879, of ½ mill upon the capital stock for each 1 per cent of dividend when the dividend is 6 per cent or more upon the par value of the stock, and of 3 mills upon each dollar of the valuation of the capital stock when the dividend does not amount to 6 per cent upon the par value, are in fact much less than would be a payment of 4 mills upon the value of such personal property as is enumerated in § 17 of the act of 1879, and is owned by them. It is then contended that, admitting these facts to be true, § 17 of the act of 1879, and § 1 of the act of 1881, must be construed to include corporations, since if they should be excluded they would pay a less tax upon mortgages, etc., than individuals; and the act would be in contravention of § 1, article IX. of the Constitution, which provides that "all taxes shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and shall be levied and collected under general laws."

The master feels that it would not be either proper or profitable for him to go into any discussion of the effect of § 17 of the act of 1879, and § 1 of the act of 1881, or of the constitutionality of these acts. These questions have been very carefully and elaborately discussed in this court in the case of Guarantee Trust

Company v. Loughlin, and by the supreme court in Fox's Appeal, 112 Pa. 337, 4 Atl. 149, and in the case of Hunter's Appeal, 18 W. N. C. 411.

These cases have definitely decided that the sections of the acts referred to do not apply to corporations, and that they are not unconstitutional because of the fact that they do not so apply. The master, therefore, sustains the objection to the testimony offered, and excludes all parts of the reports and schedules which relate to companies other than the complainant.

The master, however, considers it to be his duty to analyze these reports and report the facts which they disclose, in order that (should there be any disposition upon the part of your honorable court, or of the supreme court to reconsider the question in view of anything they may contain) there may be no occasion for a subsequent reference. It appears, from such analysis and a careful calculation and comparison of the figures, that the aggregate amount of the capital stock of all of the corporations of the state which made returns to the auditor general and insurance commissioner for the year 1883, was on the 31st day of that year $24,433,927.31.

The total amount of their real estate, bonds of the United States and of the state of Pennsylvania, and other property not enumerated in § 17 of the act of 1879, and § 1 of the act of 1881, was at the same time $29,580,389.09. The total amount of their mortgages, moneys at interest, and other personal property, enumerated in the said sections of the said acts was $86,932,250.63. The total of the assets of these corporations was $116,512,639.72. The total amount of the dividends declared and paid by them during the same year was $2,085,919.47, which equals 8½ per cent upon the par value of their capital stock. The total amount of the tax paid upon the capital stock for that year by these corporations was $143,617.45, which is equivalent to 1¼ mills upon each dollar of their assets and to about 2 2/10 mills upon each dollar of their mortgages and other personal property enumerated in said sections of said acts. A tax of 4 mills upon each dollar of the total amount of the mortgages and other taxable personal property owned by these corporations for the year 1883 would have amounted to $347,729.

The master reports that the preliminary injunction heretofore made should be continued and made perpetual.

Thereupon final decrees in all the cases were entered by the courts below; and this was assigned as error.

Ellis Ames Ballard, A. Wilson Norris, and *Rufus E. Shapley,* for appellants.—The question raised by these appeals—whether under existing laws corporations are exempt from the payment of the 4 (or 3) mills tax upon their mortgages, etc.—comes before the court in a different shape from that in which it was raised in Fox's Appeal, or in the appeals from preliminary injunctions recently argued at Pittsburgh.

In the case of the Girard Life Insurance Company, the master's report shows that: (*a*) As to this particular company, a gross want of uniformity actually results, if the construction of the acts by the lower courts be correct; and (*b*) that as to all the moneyed corporations of the state which make returns according to law, an equally gross want of uniformity results, because the so-called capital stock tax paid is not equal to a tax of more than 1¼ mills on each dollar of their assets, or to more than 2 2/10 mills on each dollar of their mortgages, etc. (if their real estate, etc., is to bear no part of the so-called capital stock tax paid); while individuals are compelled to pay 4 mills, under the acts of 1879 and 1881, and 3 mills, under the act of 1885, on each dollar of their mortgages, etc.

In the twenty-one Philadelphia cases now before this court on appeals, in which the same question is raised, the following facts are admitted in the pleadings, as the records themselves show, *viz.:* (1) That in each of these twenty-one cases a similar want of uniformity of taxation results under the decisions of the lower courts; and (2) that in all of them the capital stock of $13,710,000 is more than represented by $16,828,344 of real estate and other property exempt from this personal-property tax, while the mortgages and other personal property enumerated in § 17 of the act of 1879 amount to $81,365,162.11, and the total assets to $98,193,506.38; that the dividends paid amounted to $1,932,000 in a year, being equal to an average dividend of 14 per cent on the entire capital stock; that the so-called capital stock tax paid was equivalent to but 9/10 of 1 mill on the total assets, or to 1 1/10 mills on the mortgages, etc., only; and that the total so-called capital stock tax and tax on net earnings were equivalent to but 1 2/10 mills on the total assets, or to 1 5/10 mills on mortgages, etc., only.

The master's report in the one case, and the facts admitted in the pleadings in the other cases, show that, in fact, double taxation does not result in the sense in which it was supposed by the lower courts that it would result, because, in every case, the capital stock, which was supposed to bear the burden of the so-called capital stock tax, is invested in, or at least represented by, real estate and other property exempt from the personal property tax, largely exceeding the amount of capital stock actually invested by stockholders, and that the only part of the assets subject to the personal property tax consists of mortgages, etc., held in excess of the other assets which may fairly be regarded as representing the capital stock.

The main grounds upon which the commonwealth claims that the final decrees entered by the lower courts in these cases should be reversed—notwithstanding what was said by this court in Fox's Appeal, and its recent disposition of the appeals from preliminary injunctions—are these:

The decision of the lower courts resulted from several manifest errors,—*viz.:*

Supposing that the act of 1879 was intended to introduce an entirely new system of taxation, and to be a complete revision of all the tax laws affecting both corporations and individuals; whereas, in fact, it was intended to be only a revision of the tax laws affecting corporations, as the original title shows (Martin v. Com. 107 Pa. 185), and so far as relates to the personal property tax, there was nothing new in it, if the commonwealth's contention be correct, but it was only a re-enactment of a system of taxation which had been in force for thirty-five years.

Assuming that § 17 could not be held to apply to corporations unless they were meant to be included in the word "persons," thereby overlooking the general words "all mortgages," etc., and then holding that the word "person" was to be construed as it had been (in School Directors v. Carlisle Bank, 8 Watts, 289), when used in the old act of 1831, from which this act was admittedly not copied, whereas the word "person" as used in the act of 1844, from which this act was admittedly copied, had been construed by this court, in six later cases, to include corporations.

Assuming that, by construing the act to exempt the mortgages, etc., of corporations, uniformity of taxation would result, when, in fact, the contrary must be the necessary result.

For thirty-five years prior to 1879 all mortgages, etc.,

whether owned by corporations, or by individuals, were subject to a 3-mill tax, under the act of 1844, and corporations, in addition, to a so-called capital stock tax measured by the dividends declared.

In enumerating what classes of personal property should be liable to this personal property tax, the legislature copied into § 17 of the act of 1879 the very same language which had been adopted thirty-five years before in the act of 1844 to include the mortgages, etc., of corporations, as well as of individuals, and which had been for thirty-five years thus construed by this court.

Therefore, upon the principle *Contemporanea expositio fortissima in lege,* and upon the authority of Fox's Appeal, 112 Pa. 337, 4 Atl. 149; Guarantee Trust Co. v. Loughlin, 2 Pa. Co. Ct. 591, and Delaware Mut. Ins. Co. v. Loughlin, 1 Pa. Co. Ct. 600, as the very words used in the act of 1879 had been repeatedly construed by this court to include corporations, in Philadelphia Sav. Fund Soc. v. Yard, 9 Pa. 359; Fire Ins. Co. v. County, 9 Pa. 413; Easton Bridge v. County, 9 Pa. 415; Carbon Iron Co. v. Carbon County, 39 Pa. 251; Lackawanna Iron & Coal Co. v. Luzerne County, 42 Pa. 424, and Lycoming County v. Gamble, 47 Pa. 106, all of which were overlooked by the lower courts, we are bound to presume that the legislature adopted the construction so often put upon those words by this court.

If the legislature had intended to introduce a new system by which, thereafter, individuals only, and not corporations, should pay a certain specific tax upon their mortgages, etc., it would naturally have used language which would have clearly shown such a purpose, rather than the very same language, which for thirty-five years had been held to include corporations.

The legislature must necessarily have known, from the official reports made to it annually according to law, showing the exact financial condition of all the moneyed corporations of the state, that, if corporations were thereafter to be exempt from this tax, while individuals were compelled to pay it, a gross want of uniformity of taxation and a clear violation of the Constitution would result.

The legislature could not have intended the so-called capital stock tax, in the case of corporations, to take the place of the 3-mill tax on mortgages, etc., in the case of individuals, because

the first is a variable tax, depending upon the ratio of dividends, not to the actual assets, but to the nominal capital stock, which could not be equal to the tax which individuals are compelled to pay on mortgages, etc., except in the case of a few companies, the bulk of whose assets happens to be invested in other species of property, or where dividends, ranging from 20 to 50 per cent, are declared; and because many of the largest corporations of the state have no capital stock, and, therefore, pay no so-called capital stock tax.

Nor could the legislature have intended the tax on net earnings, paid by those companies which have no capital stock, to take the place of the tax on personal property, because the former is not a tax upon property, but upon profits; and if no profits should be earned in any year, no tax would be paid by a company owning a vast amount of mortgages, etc.

The language of § 17 of the act of 1879 shows that the intention was to impose this tax upon all mortgages, etc., without regard to their ownership, because exceptions are made which would have been wholly unnecessary if the section had been intended to apply only to individuals.

Even if the legislature had known nothing of the results which would naturally follow from exempting the mortgages, etc., of corporations from this tax, there is nothing in the act, or in the tax legislation of the state, to show a purpose to so radically alter the system of taxation which had prevailed for thirty-five years; but, on the contrary, it is evident that the purpose was to increase the revenue of the state, not to diminish it.

As this court, in Fox's Appeal, upheld the constitutionality of the act, even upon the assumption that the mortgages, etc., of corporations were exempt, and when it was doubtful whether substantial uniformity of taxation would result under such a construction, it will the more readily uphold its constitutionality now, when it is demonstrated that, upon any other construction than that contended for by the commonwealth, a gross want of uniformity must result—and when it is also demonstrated that this construction, while it may in a few instances result in a species of double taxation, will be in harmony with the system of taxation which has so long prevailed in this state, and which this court has uniformly upheld.

If the mortgages, etc., owned by corporations are not taxable under the acts of 1879, 1881 and 1885, they are still taxable

under the acts of 1844 and 1846, which were only repealed in so far as they were inconsistent with or substantially re-enacted in the later acts.

John J. Ridgway, John G. Johnson, Joseph B. Townsend, Charles S. Pancoast, John Marshall Gest, Richard L. Ashurst, Josiah R. Adams, Samuel B. Huey, Edward S. Sayres, John Hill Martin, Richard C. McMurtrie, Theodore F. Jenkins, Redding, Jones & Carson, Edwin S. Dixon, William E. Littleton, William Henry Rawle, George Tucker Bispham, William Henry Coleman, and *Henry T. Coleman* for appellees.

M. E. Olmsted for corporations not parties but interested in the question.

PER CURIAM:

After a very careful consideration of the several appeals now before us we are of opinion that the acts of 1879, 1881, and 1885 do not, nor do any of them, impose taxation for state purposes upon mortgages owned by corporations. Our views upon this subject were fully expressed by Mr. Justice PAXSON in his opinion in the case of Fox's Appeal, 112 Pa. 337, 4 Atl. 149, and it is unnecessary to repeat them now.

In consideration of the very comprehensive character of the legislation contained in these acts in reference to the taxation, as well of mortgages as of other forms of personal property, it is a matter of the gravest doubt whether the acts of 1844 and 1846, so far as they relate to the taxation of mortgages in the hands of corporations, are now in force. We do not think it is the proper function of the judiciary department of the government to impose taxation, which is a species of confiscation, by a strained construction of doubtful legislation. The proper remedy for that kind of difficulty is legislation which is not doubtful.

The repealing clauses of the acts of 1879 and 1885, embrace all prior laws which are "inconsistent" with or "substantially re-enacted" by those acts. It is impossible for us to say that the acts of 1844 and 1846 are not "inconsistent" with, or "substantially re-enacted" by the acts of 1879 or 1885. So far as the taxation of mortgages is concerned the later legislation seems to provide a system full, complete, substitutionary in character,

and seemingly *intended* to take the place of the former. In the very best view of the subject for the commonwealth, it is exceedingly doubtful whether the earlier acts can be considered as now in force for the purpose of taxing mortgages in the hands of corporations; and the mere fact of such doubt interdicts the proposed taxation.

Decrees affirmed.

Mr. Justice STERRETT dissents. Mr. Justice PAXSON absent.

Charles Vowinckel, Plff. in Err., *v.* Calvin M. Patterson.

Under the act of April 13, 1840, which provides for the partition by the orphans' court of the real estate of decedents in cases of testacy, wherein the course of descent is not altered, the orphans' court has no jurisdiction where lands are devised to six out of eight heirs at law. In that case the course of descent is changed and the devisees take as purchasers.

The act of April 25, 1850, does not extend the act of April 13, 1840, to this case.

(Argued May 24, 1887. Decided June 1, 1887.)

July Term, 1886, No. 79, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Reargument of writ of error to the Common Pleas of Blair County to review a judgment for the plaintiff on a case stated. Reversal sustained.

The facts as presented by the case stated appear by the report of the decision filed October 4, 1886, 114 Pa. 21, 6 Atl. 470.

Upon January 24, 1887, the supreme court made the following order: "Reargument ordered. The attention of counsel is invited to the question whether the act of April 25, 1850, which construes the act of April 13, 1840, and extends its provisions to future cases, applies to this case. The prothonotary will issue process to bring up the record in this case." 2 Pa. S. C. Dig. 34.

Aug. S. Landis, for plaintiff in error.—This court reversed

NOTE.—This case is a rehearing of Vowinckel v. Patterson, 114 Pa. 21, 6 Atl. 470.

the judgment entered against Vowinckel by the court below for purchase money upon land decreed to Patterson on a proceeding in partition in the orphans' court, because, as it was a case of testacy and the course of descent was altered by the will of the decedent, the orphans' court, under § 4 of the act of April 13, 1840, had no jurisdiction. The section reads as follows:

Sec. 4. "The jurisdictions of the several orphans' courts of this commonwealth, in the partition and valuation of the real estates of decedents, shall extend to all cases of testacy wherein the parties interested or any of them are minors, or the course of descent is not altered by the provisions of the last will and testament of the decedent, and the same proceedings shall be had thereon as in cases of intestacy; subject always, however, to the provisions of the said last will and testament and the true intent and meaning of the testator; Provided, however, That nothing in this section contained shall be construed to prevent any of the parties interested in the said real estate from proceeding by action of partition as heretofore."

It will be observed there are two classes of cases in which the orphans' court may partition lands devised by will, *viz.*, first, where any of the parties interested are minors; and second, where the course of descent is not altered by the will. This case coming under the second inhibition, this court held that the orphans' court had no jurisdiction and reversed the judgment of the court below.

But attention is now called to § 5 of act of April 25, 1850, which reads as follows:

"The provisions of the said § 3 of the act of April 13, 1840, according to the meaning thereof as declared by § 1 of this act, shall extend to all cases which have heretofore arisen and which may hereafter arise within this commonwealth."

Section 3 of the act of April 13, 1840, reads as follows:

"All proceedings heretofore had in orphans' courts of this commonwealth for the partitions of any testator's estate or estates, wherein partition hath been made or the property taken at the valuation or sold and conveyed under the order of such court, by executors or administrators, and the proceeds of such sales distributed according to the will of the testator, shall be considered and taken to be as valid and effectual as if such courts had had jurisdiction of the same."

Section 3 of the act of 1840 is, by § 5 of the act of 1850, ex-

tended to all such cases "which may hereafter arise," which may be "according to the meaning thereof as declared by the first section" of the act of April 25, 1850, which reads as follows:

Section 1 of act of April 25, 1850.

"The provisions of the 25th section of the act of assembly of March 29, 1832, entitled 'An Act Relating to Orphans' Courts,' which requires executrices in certain cases to give security, shall be construed to embrace all cases therein specified, whether there are minors concerned in the estate or not and whether she is sole executrix or otherwise."

The section of the act of 1832 here referred to only required executrices who were married, or were about to marry, to give security; but by the above § 1 of the act of 1850, it is seen that in all cases executrices shall give security.

Now it will be observed this first section of the act of 1850 relates solely to executrices and requires them to give security in all cases. So when § 5 of the act of 1850 provided that § 3 of the act of April 25, 1840 (which was a validating section for previous partitions), should extend to cases hereafter arising, according to the meaning thereof as declared by § 1 of the act of 1850, it meant simply that, in future partitions in cases of testacy, if there was a testatrix she should give security. This is the meaning of the first section of the act of 1850, and when cases hereafter arising are to be treated as valid according to that meaning, then they are valid if there is a testatrix named in the will and she has given security. In this case there was no executrix. There were executors named in both wills.

Section 3 of the act of 1840 is a validating section for partitions previously made of estates which had been devised by will. It cured any defects therein. It is immediately followed by § 4, which forbids the jurisdiction of the orphans' court where the course of descent is altered. When the legislature thought it necessary to condone some errors of the past, it considered it necessary to say what should be done in the future—and that was, in two classes of cases of testacy, the orphans' court should not have jurisdiction. To claim that § 5 of the act of 1850 validates all violations of the law in the future is to claim too much.

If this argument is sound, there is no imaginable case of testacy in which partition would not be in the orphans' court; and besides, the other important provisions of § 4 would be

swept away. Nor would it matter what omissions of necessary acts as now recognized, nor commissions of wrongful acts the parties might be guilty of; all would be corrected by this potent § 5 and every partition be valid, no matter who was wronged or defrauded, or in what manner it was done. It would operate as a repeal of all law on the subject, and all methods of procedure would be conformed either to interest or caprice.

If the legislature by the act of 1850 had intended to repeal § 4 of the act of 1840, it could easily have said so. It made no reference to it. It did say, however, that all cases of partition which had arisen, or which might hereafter arise, should be valid according to the first section of the act of 1850—that is, if in past cases there were executrices, the partitions shall be valid, if they had not given bail; and in future cases executrices must be required to give bail.

It is claimed on the other side that the expression in § 5 of the act of 1850, "as declared by the first section of this act," should read: "as declared by the fourth section of this act;" in other words, that it is a typographical error. The said fourth section was one declaring the meaning of § 3 of the act of 1840, but limited it to one class of cases,—*viz.*, cases of testacy where the devise to a devisee "had become lapsed," or "had become forfeited," or "the devisee had refused to take or accept the same."

The case in hand exhibited no one of these three conditions. The will of Isaac Thompson named as his devisee certain persons and excluded others. Those who were excluded would have been his heirs at law, and so the course of descent, as was properly decided last year, was altered. It is obvious, therefore, there was no misprint, and it was the first section which was referred to, and not the fourth.

The legislature never intended to repeal § 4 of the act of 1840; and as this was a case of testacy where the descent was altered by the will, the orphans' court had no jurisdiction, it is in no way affected by the act of 1850, and the judgment of reversal cannot be disturbed.

Benj. L. Hewit, for defendant in error.—The jurisdiction of the orphans' court to make partition was originally confined to the estates of intestates. The act of April 13, 1840, § 4, extended the jurisdiction of the orphans' court to cases of testacy where the parties, or some of them, were minors, or where the course of descent, under the intestate law, was not altered by will.

It will be observed that § 3 of the act of 1840 had retroactive effect, validating "all proceedings heretofore had in orphans' courts of this commonwealth, for the partitions of any testator's estate or estates, wherein partition hath been made or the property taken at the valuation," etc.

Section 4 of the act of 1840 simply extended the jurisdiction of the orphans' court in partition to "all cases of testacy," wherein the parties interested, or any of them, are minors, or the course of descent is not altered by the provisions of the last will and testament of the decedent. But attention is called to § 4 of the act of April 25, 1850, in connection with § 5 of the same act, which is as follows: "That the true intent and meaning of § 3 of the act passed the 13th day of April, 1840, entitled 'A Further Supplement to an Act Entitled "An Act Relating to Orphans' Court," Passed the 29th day of March, 1832, and the Supplements Thereto Passed the 14th day of April, 1835, and For Other Purposes,' is hereby declared to be, that the title of persons to real property of decedents, within this commonwealth, heretofore acquired under proceedings in partition in the orphans' court, if such proceedings were in other respects regular, shall not be impaired or in any wise defeated, or made void by or upon any other proceeding in any court of this commonwealth, by reason of such property or any part thereof having been devised by any such decedent to children or heirs generally, or to any one or more of them, or of other persons, if such devise to one or more had become lapsed, or had become forfeited for nonperformance of any condition, or the devisee or devisees for any reason had refused to take or accept the same; but such titles so acquired shall be considered and taken as valid and indefeasible, as in cases of intestacy, unless the same have been invalidated by reversal of the decree or decrees awarding the same upon appeal duly taken and prosecuted."

This section is manifestly a construing one—relating to jurisdiction in the orphans' court of "all proceedings" had thereon, in partition of testators' estates, without regard to the character of the recipients as devisees or course of descent as plainly expressed in § 3 of act of 1840, confirming titles acquired under such proceedings in partition, as well as in cases of forfeited and lapsed devises. It explains the "true intent and meaning" of § 3, which by its express and unequivocal provisions "validated" and rendered "effective" "all proceedings" and

jurisdiction in the orphans' court, in all cases of testacy had since the act of 1882, the same as cases of intestacy.

Section 5 of the act of 1850 then provides that the provisions of the said § 3 of the act of 1840, "according to the meaning thereof," as declared by the first section of this act, "shall extend to all cases which have heretofore arisen and which may hereafter arise within this commonwealth."

This is evidently a mistake, and "first" should read "fourth" as the context plainly shows. The third section of the act of 1840 is distinctly alluded to in the fourth section of the act of 1850, and its "true intent and meaning explained" relating to the same subject-matter,—to wit, jurisdiction of the orphans' court in cases of testacy, construing the same and confirming titles acquired under the provisions of the same, which in point of fact, as well as in effect, repeals the fourth section of the act of 1840, for the reason that the provisions of § 3 of the act of 1840, "validate and make effectual" all partitions in the orphans' courts in cases of testacy since the act of 1832, and § 5 of the act of 1850, as explained and construed by the fourth section of the act of 1850, in relation to the same subject-matter of jurisdiction, extends its provisions "to all cases which have heretofore arisen and which may hereafter arise within this commonwealth;" in other words, condoning errors of the past in all cases of testacy, where the orphans' court entertained jurisdiction—confirming the titles acquired under such proceeding "if regular," and extending jurisdiction in all cases in the future.

It is true there is no repealing clause in the act of 1850, expressly repealing § 4 of the act of 1840; but the provisions of the same, coupled with § 3 of the act of 1840, validating all proceedings in the orphans' court in all cases of testacy and extending the same to "all future cases," render § 4 of the act of 1840 special in character; and, being conflicting and contradictory, it must yield to the later and general law providing for all cases of testacy.

Further, plaintiff in error misapprehends § 5 of the act of 1850, as we think. It cannot and does not apply or refer to the first section of the act of 1850, because reference thereto shows that the first section simply refers to and construes § 25 of the act of 1832, relating to "an executrix having minors of her own, or being concerned for others, is married, or likely to

be espoused," requiring her to give security for the "minors' portions." The first section of the act of 1850 simply construes this and makes it applicable and "embrace all cases therein specified, whether there are minors concerned in the estate or not, and whether she is sole executrix or otherwise." Section 3 of the act of 1840 plainly indicates its object and purposes, and nowhere in its provisions is there any allusion to such subject-matter; nor does the act of 1850 in § 4 or 5 make reference or allude to anything of the kind, but refers exclusively to jurisdiction and proceedings thereon in cases of testacy in the orphans' court, and it must be a typographical error, and not a material inquiry in this case.

Section 5 of the act of 1850, especially when taken in connection with the construction put on § 3 of the act of 1840 by § 4 of the act of 1850, in effect repeals § 4 of the act of 1840; clearly intending that the orphans' court should have jurisdiction in all cases of testacy, without conditions and over any imaginable interest.

Opinion by Mr. Justice Trunkey:

When this cause was heard and decided no reference was made to the act of April 25, 1850, P. L. 570. After the decision was announced, a jurist of much experience in all that pertains to the business in the orphans' court, whose suggestion is entitled to consideration, called our attention to that statute; and the question of jurisdiction being so important, a reargument was ordered. The learned counsel have greatly aided us by their able arguments upon the question.

The fourth section of the act of 1850 declares the true intent and meaning of the third section of the act of 1840, "to be that the title of persons to real property of decedents in this commonwealth, heretofore acquired under proceedings in partition in the orphans' courts, if such proceedings were in other respects regular, shall not be impaired, or in any wise defeated or made void, by or upon any other proceeding in any court of this commonwealth, by reason of such property, or any part thereof, having been devised by any such decedent to children or heirs generally, or to any one or more of them, or to other persons, if such devise to one or more had become lapsed, or had become forfeited by nonperformance of any condition, or the

devisee or devisees for any reason had refused to accept the same."

The fifth section declares that said § 3 of the act of 1840, according to the meaning thereof as declared by § 1 of this act, shall extend to all cases which have heretofore arisen or which may hereafter arise within this commonwealth.

Without considering whether the court may amend said § 5 by striking out the word "first" and inserting instead the word "fourth," it is clear that the meaning of the third section of the act of 1840 is defined in the act of 1850. Prior to the statutory definition of said § 3 of the act of 1840, its meaning was plain; now it is unlikely that it can be satisfactorily ascertained. Its application is limited to cases where the devise is to children or heirs generally, or to any one or more of them, or to other persons, if the devise has become lapsed, or forfeited for nonperformance of a condition, or the devisee has refused to accept.

The expression "if such devise to one or more had become lapsed" or forfeited, or unaccepted, cannot be applied exclusively to a devise "to other persons;" nor do we now say it applies to such devise; by repeating the words "one or more" it relates to the devise "to children or heirs generally, or to any one or more of them." Nothing in the facts of this case brings it within the statute.

Perhaps it would have been useful legislation had the jurisdiction of the orphans' court been extended so as to include partition in all cases of testators' estates.

The judgment already entered must stand. Record remitted.

Henry S. Knarr, Assignee of Calvin Sloppy, Plff. in Err., *v.* John Elgren.

Until overcome by testimony which, if believed, ought to move a chancellor to decree the note on which a judgment is entered void, or to be reformed because of forgery, fraud, or mistake, the judgment should not be opened.

That the maker of the note cannot read the language in which it is written is a fact to be considered; still, the burden is on him to establish that it was falsely read, or represented to be other than what is written.

(Argued May 5, 1887. Decided June 1, 1887.)

January Term, 1887, No. 311, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Clearfield County to review a judgment on a verdict for the defendant in an action of debt. Reversed.

John Elgren, the defendant, gave to Calvin Sloppy (also written Calvin Slopp) a judgment note under seal for $500, with interest, attorney's commission, etc., dated March 7, 1885, payable one month after date. Both parties lived at DuBois, in Clearfield county. March 9, 1885, judgment was duly entered upon this note, in the court of common pleas of Clearfield county, of No. 182, May term, 1885. March 21, 1885, this note was duly assigned in writing by the plaintiff to Henry S. Knarr, and the assignment filed March 23, 1885.

In April, 1885, on application of the defendant, a rule was granted to show cause why the judgment should not be opened. Depositions were taken and read upon the argument of this rule; and July 21, 1885, the judgment was opened, and the defendant let into a defense. The cause was tried in May, 1886.

The evidence adduced at the trial is reviewed in the charge to the jury.

Counsel for the defendant asked the defendant, *inter alia:*

Q. State if you had any business transactions with Fowler and McMinn in 1884.

Objected to by the plaintiff.

By the Court: "What is the purpose of the question?"

Mr. Wilson: "The purpose is to show that at the time he sold the property to these gentlemen and received $1,015, that he deposited that money—that he had money in bank in 1884."

Objected to by plaintiff as irrelevant and incompetent.

Objection overruled, evidence admitted. Fifth assignment of error.

The counsel for the defendant also asked Charles Fowler, a witness for the defendant:

Q. Did you ever have any transactions with John Elgren? If so, what was it, and when was it?

A. I spoke to him of selling his property—he wanted to sell it.

Q. What year was it?

Mr. Cole: "State what you propose to prove."

Mr. Wilson: "We propose to prove that Elgren sold his property to Fowler and McMinn, and that Fowler paid him $1,015 in money at that time. This was for the purpose of showing that John Elgren had money in his possession at this time and also to corroborate John Elgren."

Mr. Cole: "Objected to as incompetent and irrelevant."

Objection overruled, evidence admitted. Sixth assignment of error.

KREBS, P. J., charged the jury as follows:

This is a proceeding to determine whether or not the defendant is indebted on this note to Calvin Sloppy, or his assignee, H. S. Knarr. On the 9th of March, 1885, the note was filed of record in the prothonotary's office in this county. It bears date the 7th day of March, 1885, is due at one month after date with interest at 5 per cent, and is for $500, with a warrant of attorney which authorized the prothonotary, under the laws of Pennsylvania, to enter it of record as a judgment. It is signed by John Elgren, and is not disputed so far as the signature is concerned.

On the 24th of March, 1885, a paper was filed showing a statement of this judgment that had been entered by Mr. Kerr, the prothonotary, a statement which they usually give or send to every person who leaves or sends a judgment note if it is sent by mail. On the back of that statement there is an assignment, partly in printing and partly in writing, bearing date the 21st of March, 1885, signed by Calvin Sloppy, transferring this note or judgment as it was then (it having been entered of record) to H. S. Knarr, his heirs, executors, or assigns.

After the execution was issued upon this judgment the defendant came into court and presented a petition setting forth certain facts, and asking the court to open that judgment and let him into a defense. Subsequently an order was made by the court staying the writ of execution and maintaining the levy and lien of the writ of fieri facias, and the judgment was opened and the defendant let into a defense. The case is now upon the trial list and before you for your disposition. The reasons for this proceeding are that on the hearing of the testimony taken on a commission on the order to open this judgment there were some disputed facts between these parties, that we thought we had no power to decide it, and it must be decided by a jury; therefore the order was made that the case should be put upon

the trial list and presented to a jury, who should determine what the facts were in regard to this note.

In this trial you will have observed that the plaintiff offered this note signed by Elgren, the signature not being disputed, and rested his case. That made out a prima facie right to demand the amount of this note, and it then became the duty of the defendant to show what his defense to the note was. In pursuance of that the defendant was called to the witness stand, and he details what he alleges were the circumstances attending the making of this note. As we stated before he admits signing the note, but testifies and claims that at the time he signed this note he could not read it himself; that it was signed, as we understand it, after dark or late in the evening, in the office of 'Squire Williams; that the 'Squire was not there, but that Sloppy urged him to sign it, he (Sloppy) saying that it was all right, and that he (defendant) signed it believing it to be a $5 note; that he did not know that it was a $500 note; that, under the representations made to him that it was a $5 note, he signed it, and he says that at that time he owed Sloppy $5.50.

He also states that the 50 cents was spoken of subsequently; that one day, a short time after this, he went or spoke to a man about having some small change to pay Sloppy the 50 cents, but that nothing was done at that time about the 50 cents. He also states that he had a transaction with Sloppy on the street. It appeared that he owed one J. Christ a board bill, and had left his (defendant's) watch as a pledge or security for this board bill; that the amount owed was $15.50; that Sloppy offered to loan him the money in order to get his watch; that he did get from Sloppy the $15.50 to pay the board bill, and left his watch; that subsequently Sloppy got from him a set of harness worth $10, which left him (defendant) owing Sloppy $5.50; that he believed at the time he signed this note that the note was for $5 of that $5.50, and that he did not know it was a $500 note.

The defendant also called Truman Ames, a member of the bar, living at DuBois, to the witness stand, who says that about the time of this transaction (I do not remember whether he states the day) Calvin Sloppy came into his office after supper or about the time of lighting the lamps, as we remember the testimony, and asked him (Ames) whether he had a blank judgment note, and he said he had; that he (Sloppy) asked him to fill

one up, and at his dictation, he (Ames) dated it that day, the 7th of March, payable to Sloppy, for the sum of $500; that Sloppy did not say who it was to be signed by; that he did not ask him, and Sloppy went out. So that it would be in the evening after supper of the 7th of March. Of course, whether it was the dusk of evening or dark would depend somewhat upon the time that Mr. Ames had supper.

Elgren (defendant) testifies that he and Sloppy met on the street that evening and Sloppy asked him to go to 'Squire Williams's and sign this note, and that he did go and sign the note—which he claims was not a $500 note but a $5 note. Now, if that be true, for that is all there is in this case, if he signed this note under the belief that it was a $5 note and not a $500 note, and that his signature was procured by the fraud and misrepresentation of Sloppy, it would not be valid as between him and Sloppy; it would be such a fraud upon him (defendant) as could not stand, if his testimony be true in regard to the making of this note.

But the note has passed into the hands of H. S. Knarr. It is not negotiable; so that Mr. Knarr was bound to inquire and know whether or not Elgren had any defense to it before he could take it. If he (Knarr) took it without any inquiry at all, it not being negotiable, Mr. Elgren has the same defense against Knarr that he would have against Sloppy. But it is alleged on the part of the plaintiff in this case, Mr. Knarr, who is the equitable plaintiff and assignee of the note from Sloppy, that he (Knarr) did go to Elgren and inquire of him whether or not he owed Sloppy the amount of this note, and that Elgren told him (Knarr) that it was "all right," he (Elgren) owed him (Sloppy) $500.

Other witnesses are called by Mr. Knarr to show that he (defendant) stated to other persons that he owed Sloppy $500. To one or two of the witnesses, as we remember the testimony, when asked whether or not he owed that Sloppy note, he said the note was all right. Now if before Mr. Knarr bought this note he went to Elgren and inquired of him whether or not he owed Sloppy the amount of this note, Elgren was in duty bound to disclose any defense he had to it, and it becomes an important inquiry between these men to know whether or not they understood each other.

If the inquiry was made in such a way as that Elgren under-

stood what Knarr was inquiring about; if Elgren knew at the time what the inquiry of Knarr was, and Knarr used language inquiring whether or not he owed Sloppy $500, and he (Elgren) said that he did, and after that Knarr bought this note for a valuable consideration, in good faith, then he (Knarr) must be protected, whether it was a bona fide note or not, because it was the duty of Elgren at that time to disclose any defense he had to it. If he (Elgren) understood this note to be for $500 from Knarr's declaration, he was bound to say so, because it is alleged by Knarr that he bought it on his (Elgren's) declaration, then he (Elgren) would have to pay it whether it was all right between him (Elgren) and Sloppy or not.

The other testimony in regard to Elgren, stating that it was a $500 note, is simply as corroborating the testimony of Mr. Knarr. As we recollect it (unless it be the testimony of Mr. Rudolph) it is all subsequent to the time at which Knarr got the note; and although he may have said so at the time Knarr got the note, yet if Knarr parted with his money without proper inquiry, although he (Elgren) may have said to other persons afterwards that it was all right, yet that would not help Mr. Knarr. But this is evidence as bearing upon the question of whether or not he said so to Mr. Knarr.

Now, Mr. Rudolph testifies, if we remember his testimony, that about the first of March he had a conversation with Mr. Elgren at the house in which he (Elgren) was then living; that he took dinner there one day, and Elgren complained that Sloppy was going to make him trouble; that when he asked why, he (Elgren) said he owed Sloppy $500, and he (Sloppy) was going to push him. Now, if that was on the first of March it was not this note that was referred to, because this note was not made until the 7th of March. But it may have had reference to the note which Sloppy says this note was given in exchange for.

In Sloppy's reference to the transaction (in his deposition) he says that in 1884 Elgren had borrowed $500 from him and given this note. This 1884 note was due on the 7th of March, 1885, and this note dated the 7th of March, 1885, was given in renewal of the old (1884) note. Now, as bearing on that question, some evidence has been put in here as to the necessity of Mr. Elgren for borrowing money at that time. Evidence has also been offered to show that at that time he (Elgren) had sold property, and that he had got $1,015 in money out of that prop-

erty; that he paid off some indebtedness and had $690 in bank; that he drew out of bank $400, and of that amount paid $375 to a man by the name of Casey, and had $25 of money in his pocket. Although that testimony may not be very material in a question of this kind, yet the jury has a right to consider that as bearing upon the question of whether or not he did borrow this money from Sloppy in 1884, and gave him a note for $500.

It is also offered on the part of the plaintiff (Knarr) in this case, that Sloppy, at different times, had considerable amounts of money. That would be evidence as to whether or not he had any money to loan in 1884. It bears, however, upon the question of whether or not this note was made for $500 by Sloppy. But the principal question you have to determine in this case is whether or not before Mr. Knarr bought this note he went to Elgren and inquired if he owed Sloppy this amount of money. That is the principal question; because even if you should determine that the note was signed by Elgren as a $5 note, yet if, when Knarr came to buy it, before he bought it or parted with his money, he went to Elgren and inquired about this transaction and asked him if he owed this $500, and the old man (Elgren) understood it; if it was spoken to him in such a way that he (Elgren) understood it and said it was all right, he owed the $500, then he would have to pay this note if he can; because, as we said before, he was bound to disclose any defense that he had to it.

Now, take this case, because it is all a question of fact, and dispose of it as under the evidence you think right and proper. Court and jury are not to be moved by any feeling of sympathy for one side or the other. We are to try this case by the testimony as produced for the one side or the other. You have a right to inquire into the testimony of the witnesses, their demeanor on the witness stand, the manner in which they testify, and the reasonableness and probability of their story.

On the question of whether or not a person's reputation for truth and veracity is successfully attacked, we have just a few words to say. Of course, the weight of the testimony is for the jury; but, speaking for ourselves, we do say that we would place very little reliability upon an attack made upon a witness through the difficulties arising in such matters.

A man's reputation for truth and veracity may be attacked in any case. In cases of this kind everybody has his friends, and

they have talked about the matter. Each side has its adherents, and they say all kinds of things, and in that way a man's reputation is attacked. But for ourselves, we do say that we would give very little credit to such a state of proceedings. As to the weight that shall be given to the attack upon Mr. Sloppy and Mr. Elgren, that is for you. If their reputation for truth and veracity has been successfully attacked, of course it would be material, and for your consideration.

[Now, if you find that this note was not given for $500 knowingly by Mr. Elgren, and that Mr. Knarr did not disclose to Mr. Elgren, that is, did not inquire of him in a way by which he (Knarr) could make himself understood by this old Swede, and he (Elgren) did not know what the interrogatory was, then there could be no recovery for anything in this case, not even for the $5 which he (Elgren) owed Sloppy; because this would be a fraudulent paper, and there could not be anything recovered on it. We do not agree with the counsel for defendant upon that subject. But if you find that Knarr did go to the defendant (Elgren) and make his business known, and he (Elgren) understood what that business was and then did not disclose what his defense was, he (Elgren) must pay the note, whether it was a valid transaction with Sloppy or not.][2]

Verdict and judgment were for the defendant.

The assignments of error specified: (1) The action of the court in opening the judgment; (2) the portion of the charge inclosed in brackets; (3) the action of the court in submitting the case to the jury; and (4) that the charge as a whole, under the facts in the case, was erroneous and misleading.

A. L. Cole and *McEnally & McCurdy,* for plaintiff in error. —A judgment should not be opened unless it appears that it was originally confessed for more than in equity and good conscience was then owing by the defendant. Saunders v. Mather, 3 Sad. Rep. 346.

Where there is only the unsupported oath of one of the parties to the instrument on the one side, and the opposing and the contradictory oath of the other party, together with the words of the instrument on the other side, such unsupported oath is not sufficient to justify the reformation of the instrument. Jack-

son v. Payne, 114 Pa. 67, 6 Atl. 340; Phillips v. Meily, 106 Pa. 536.

Where a party comes in and asks to be relieved from the terms of a written instrument which he admits he signed, to justify the court to act he must present facts, supported by such evidence as would satisfy a chancellor to reform the paper. Thorne v. Warfflein, 100 Pa. 519; Nicolls v. McDonald, 101 Pa. 514; Smith v. National L. Ins. Co. 103 Pa. 184, 49 Am. Rep. 121; North & West Branch R. Co. v. Swank, 105 Pa. 555.

To set aside a written instrument on the ground of fraud, the evidence thereof must be clear, precise, and indisputable, and of that which occurred at the execution of the instrument. Cummins v. Hurlbutt, 92 Pa. 165.

Smith V. Wilson and *Murray & Gordon,* for defendant in error.—The opening of a judgment upon a warrant of attorney is a matter of sound discretion. On appeal under act of 1877, the supreme court will only determine whether such discretion has been rightly exercised. Earley's Appeal, 90 Pa. 321; Wernet's Appeal, 91 Pa. 319; Schenck's Appeal, 94 Pa. 37; Kneedler's Appeal, 92 Pa. 428; Lyon v. Phillips, 41 Phila. Leg. Int. 215; Wise's Appeal, 99 Pa. 195.

Fraud avoids all contracts and consists in false representations of things as facts which are not such, or in deceitful concealment of existing facts. Grove v. Hodges, 55 Pa. 504.

Actual fraud is for the jury. Loucheim Bros. v. Henszey, 77 Pa. 305; Rogers v. Hall, 4 Watts, 362.

On an allegation of fraud great latitude of proof is allowed. Baltimore & O. R. Co. v. Hoge, 34 Pa. 221.

Where a judgment is opened without terms (as in this case) the burden of proof is on plaintiff. Ham v. Smith, 87 Pa. 63; Carson v. Coulter, 2 Grant Cas. 121.

Where investigations are founded on imputed fraud they naturally take a wide range. Among the most common topics of inquiry is the pecuniary capacity of the supposed lender and the necessitous condition of the alleged borrower; and these inquiries are legitimate. It is surely competent for the defendant to show that the plaintiff was, at the time of the alleged lending, a poor man, and probably unable to loan the sum in question, or that the defendant was himself possessed of money, and there-

fore not driven to the necessity of using his credit. Stevenson v. Stewart, 11 Pa. 307.

This court having decided that an appeal lies to the final judgment on the issue awarded under the act of April 4, 1877, and that having been done in this case, we submit that the writ of error should be quashed, at the costs of plaintiff in error. Citizens' Bldg. & L. Asso. v. Hoagland, 87 Pa. 326; Springer v. Springer, 43 Pa. 518.

OPINION BY MR. JUSTICE TRUNKEY:

The act of April 4, 1877, provides that in all cases of application to have any judgment opened which has been entered by virtue of a warrant of attorney, or upon a judgment note, the parties aggrieved by the decision of the court of common pleas may have the same reviewed by appeal in like manner and proceeding as equity cases are now appealed.

Prior to the enactment of this useful statute the defendant who applied to have such judgment opened was compelled to submit to the decision of the court of common pleas as final when entered against him, unless he resorted to a formal bill and proceeding in equity, which was the only practical remedy for relief from an unjust judgment. In either form of procedure the relief demanded is in equity; and the applicant or complainant must make a case which would justify a chancellor in entering the decree.

The judgment in this case should not have been opened, nor the evidence submitted to the jury. Until overcome by testimony that, if believed, ought to move a chancellor to decree that the writing is void, or should be reformed, because of forgery, fraud, or mistake, it must be suffered to stand, although the parties thereto so testify that, under the circumstances, it is difficult to avoid belief that one or the other has committed perjury. That the maker of the note cannot read the language in which it is written is a fact to be considered; still, the burden is on him to establish that it was falsely read, or represented to be other than what is written.

Elgren and Sloppy both testify positively and each contradicts the other. According to the testimony of their neighbors, their reputation for truth and honesty is so bad that if the two go together, they are well matched. Hence, where either has the burden of proving a fact by two witnesses, or one witness and

corroborating circumstances he should be held strictly to the rule, when the only witness is himself.

There is some testimony tending to show that Sloppy was poor and did not have the money to lend. This is met by direct testimony that he did have money. Although positive testimony that Sloppy had money may be more satisfactory than testimony of circumstances tending to show that he had not, the question is whether these circumstances would justify a finding that he could not by reason of poverty have made the alleged loan. We think not.

Taken by themselves, they would not warrant a jury in rendering a verdict for the defendant because the note was without consideration. Here, the direct testimony against the defendant is strong, and cannot be lightly cast aside. Knarr and Rudolph testify to Elgren's admission that he gave the note to Sloppy for $500 and that it was right; and Hepburn, Forcey, and Smith to his admissions utterly inconsistent with his belief that the note was fraudulent or forged. Before Knarr purchased, in answer to inquiry, Elgren told him the note was right and to buy it. To Rudolph he complained that Sloppy was crowding him for a debt of $500 and would break him. And to others when asked if it was true that Sloppy had forged a note on him for $500, he replied: "There is nothing in it."

Were this cause tried in a court of equity in a proceeding commenced by bill, it would be dismissed. That it was commenced in another form does not prevent application of the same principles.

Judgment reversed.

Knarr's Appeal.

(Argued May 5, 1887. Decided June 1, 1887.)

January Term, 1887, No. 329, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal by Henry S. Knarr, assignee of Calvin Sloppy, from a decree of the Court of Common Pleas of Clearfield County opening a judgment entered on a judgment note, in No. 182, May

Term, 1885, in which Calvin Sloppy was plaintiff and John Elgren defendant. Reversed.

OPINION BY MR. JUSTICE TRUNKEY:

This appeal was argued with Knarr v. Elgren, *ante,* 172, and, for reasons stated in the opinion in that case, the order or decree opening the judgment must be reversed. At the trial before the jury the testimony was more voluminous, but substantially the same, as on the hearing of the rule for opening the judgment.

Decree reversed, at the costs of the appellee. Record remitted.

Appeal of Daniel Cessna et al.

Everett Glass Company's Estate.

A mechanics' lien, although duly docketed, does not, unless indexed in accordance with the act of June 16, 1836, affect a bona fide purchaser or mortgagee without notice.

(Argued May 11, 1887. Decided June 1, 1887.)

January Term, 1887, No. 279, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Common Pleas of Bedford County distributing the proceeds of a sheriff's sale of real estate. Reversed.

The facts as they appeared before John P. Reed, Esq., the auditor appointed to make distribution, were stated in his report which, in so far as it related to the question presented by this appeal, were as follows:

Daniel Cessna, trustee, had recorded in the recorder's office for Bedford county, in Mortgage Book "F," pp. 350–353, a mortgage against the Everett Glass Company for the sum of $5,000, dated July 14, 1885, on the 16th. The mortgage con-

NOTE.—For the indexing of mechanics' liens under the act of 1901, see act of June 4, 1901, P. L. 431, §§ 7, 10, 18, 23, and 43.

veyed to said trustee a tract of 6 acres of land, more or less, situated in West Providence township, in said county.

Upon this lot were the requisite buildings for the glass works, and it is the real estate sold by the sheriff.

Upon this mortgage Hon. John Cessna, attorney, issued a scire facias, entered to No. 90, April term, 1886.

And in due course, on the 3d day of March, 1886, judgment was taken for the sum of $5,200, with interest from March 14, 1886, and costs.

Upon this judgment Mr. Cessna issued a levari facias to No. 78, April term, 1886, by virtue of which the sheriff levied upon said real estate, and advertised the same for sale.

Subsequently the writ was stayed and the sheriff made return accordingly.

An alias levari facias was then issued, entered to No. 11, September term, 1886, upon which the sheriff made return:

"Land advertised for sale May 18, 1886, and notice of sale served 8 miles. May 18, 1886, land and premises within described sold to Daniel Cessna, Esq., of Bedford, Pennsylvania, for the sum of $5,030, he being the highest and best bidder, and that the highest price bidden for the same."

On this mortgage, judgment and execution Mr. Cessna claims the entire proceeds of the sale.

The Watertown Steam Engine Company, of the state of New York, by their counsel, Frank Fletcher, Esq., entered a mechanics' lien, filed and entered on the mechanics' lien docket to No. 21 of the year 1885, on the 10th day of December, 1885, for the sum of $700. Interest from October 1, '85.

The claim is for an engine furnished June 15, '85, $390, and a boiler furnished June 26, '85, $400, making $790; upon which was paid July 7, '85, $90—leaving due claimants $700.

The claim was furnished on the credit of the buildings (described at length in lien filed) on the 6 acres of land described in mortgage.

The claim was not indexed on the mechanics' lien docket.

Messrs. Reynolds & Cessna object to the lien because it was not indexed, and because of informalities, irregularities and legal defects.

Mr. Reynolds also objects that claim is not proved.

The claim, however, was subsequently proved, and it is as-

signed to the use of Daniel Cessna, to whom it was sold, and it remains unpaid.

A great deal of testimony was taken to show the origin of the mortgage debt, and Mr. Cessna's connection with the same—whether he was counsel for the same or not, and had notice of the mechanics' liens.

Daniel Cessna, the trustee, was a dry trustee and had no interest in the mortgage. He assigns $2,500 of the same to Franklin & Marshall College, July 15, '85. July 20, '85, he assigned to Mrs. Margaret Heffner $1,500. August 15, '85, he assigned $400 to Peter Fink, and on the 22d of August, 1885, $600 to John A. Gump.

Mr. John Cessna was president of the glass company and secured all the above moneys for the company from the assignees, except the loan made by Mr. Gump. Mr. Cessna was not attorney for Franklin & Marshall College, or any of the others taking parts of the mortgage, but he induced them to take the same, assuring them it would be a safe investment; and although not legally bound to them in any way, he felt morally bound to see them get a return of their money, and assured them they should not lose; hence, his interference in this business. He saw that the company was insolvent, and voluntarily issued the writs bringing the property to sale; and in the same spirit he attended the sale of the real estate, to see that it brought a price to save the people he induced to lend money to the company, and not as counsel for any person.

The lien filed is in due form, describing the premises properly, and is duly proven. The only substantial objection is that it was not indexed.

But inasmuch as the engine and boiler were contracted for under the original plan, and they were good articles faithfully furnished, and were left unpaid for at the time of the making of the mortgage, and the fact was known to the mortgagee, and there being no objection to it by the mortgagee, the claim is allowed to participate in the fund.

In accordance with the foregoing finding of facts, and opinion, the auditor respectfully reports the following:

Distribution.

Fund in court for distribution		$5,030 00
Appropriated to costs of audit		51 67
Appropriated to the Watertown Steam Engine Company, lien No. 21, of the year 1885	$700 00	$4,978 33
Int. from Oct. 1, '85, to sale May 18, '86	26 50	
Prothonotary's entering lien	1 00	
		$727 50
		$4,250 83

The above balance appropriated to the debt, interest, and costs due on judgment.

Daniel Cessna, trustee, } No. 90, April Term, '86.
vs. } Alias levari facias No. 11.
The Everett Glass Co. } Sept. Term, 1886.

Cost taxed on writ, $112.27, to be paid first.

For use of Franklin & Marshall College	$2,500 00	
For use of Mrs. Margaret Heffner	1,500 00	
For use of Peter Fink	400 00	
For use of John A. Gump	600 00	
From above bal. deduct costs to be paid first, to wit:		112 27
Balance to be appropriated to above assignees *pro rata*:		$4,138 56

Pro rata 82.77-100.

Therefore,

Franklin & Marshall College's share,	$2,069 30
Mrs. Margaret Heffner's share	1,241 56
Peter Fink's share	331 08
John A. Gump's share	496 62
	$4,138 56

The trustee and assignees excepted to the report, upon the ground that the lien should not have been allowed; but the court below dismissed the exceptions and confirmed the report.

The assignments of error specified the action of the court: (1) In overruling the exceptions filed to the auditor's report; (2) in decreeing any money to the claim of the Watertown Steam Engine Company; and (3) in not appropriating and decreeing all of the money made on sale of the real estate of the Everett Glass Company to the mortgage of Daniel Cessna, trustee, for the use of appellants.

John Cessna, for appellants.—There is but a single question at issue in this case. The contest is between a mortgage and a mechanics' lien. The third section of the act of June 16, 1836, 2 Purdon's Digest, § 3, provides and directs that prothonotaries shall "procure and keep a book docket, which shall be called 'The Mechanics' Lien Docket,' in which he shall cause to be entered and recorded, all descriptions or designations of lots or pieces of ground as hereinafter mentioned, and all claims that may be filed by virtue of this act, together with the day of filing the same; and he shall cause the names, as well of the owner of the lot or piece of ground, as of the contractor, architect or builder, if such be named, and of the persons claiming any lien under this act, to be alphabetically indexed therein."

A mortgagee is a purchaser for value. Any creditor on distribution may attack a mechanics' lien. Knabb's Appeal, 10 Pa. 186, 51 Am. Dec. 472; Norris's Appeal, 30 Pa. 122; McCay's Appeal, 37 Pa. 125.

While some liberality has been extended by the courts towards mechanics and materialmen, this liberality does not excuse a substantial compliance with the provisions of the statutes. A mechanics' lien depends on no principle of moral right, but on positive enactment, of which it is the creature, and beyond the terms of which it cannot be extended. Bolton v. Johns, 5 Pa. 149, 47 Am. Dec. 404; Noll v. Swineford, 6 Pa. 187.

The remedies afforded by the mechanics' lien law are extraordinary, and in view of the large license it confers our courts have found it necessary, for the protection of others, to hold the claimants under the law to, at least, a substantial compliance with the acts of assembly. As the law calls for nothing unreasonable at the hand of him who would fasten an encum-

brance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions. Lauman's Appeal, 8 Pa. 473.

It is open to impeachment by all having an interest in the question of its validity as owner, purchaser or subsequent lien creditor. As a lien of this nature derives its vitality exclusively from the statutes, it has been repeatedly decided that it must conform to these requisitions in every essential particular under penalty of avoidance. McCay's Appeal, 37 Pa. 125.

The right of a mechanic is not a right at common law. It is entirely of statutory creation. His privileges can only be asserted in the manner provided by the statute. Ely v. Wren, 90 Pa. 148.

In the case now under consideration no writ of sci. fa. had ever been issued and of course no judgment obtained. The claim filed, even if it had been indexed, was no record. Davis v. Church, 1 Watts & S. 240; Lauman's Appeal, 8 Pa. 473; Armstrong v. Hallowell, 35 Pa. 485.

A judgment obtained upon a mechanics' lien is not even prima facie evidence in a contest among creditors. Norris's Appeal, 30 Pa. 122.

It was the duty of the claimant to see that his lien was properly entered. Ridgway's Appeal, 15 Pa. 177, 53 Am. Dec. 586; Smith's Appeal, 47 Pa. 128. See also authorities cited in these two cases.

This lien was constructive notice to no one and actual notice of its existence would have bound no person. Simpson v. Williams, 3 Yeates, 402; Heister v. Fortner, 2 Binn. 40, 4 Am. Dec. 417; Kerns v. Swope, 2 Watts, 75; Bolton v. Johns, 5 Pa. 145, 47 Am. Dec. 404; Uhler v. Hutchinson, 23 Pa. 110; Goepp v. Gartiser, 35 Pa. 130; Myers v. Boyd, 96 Pa. 427.

The doctrine of notice does not apply to creditors, only to purchasers. Hulings v. Guthrie, 4 Pa. 123.

Besides, no notice is proved or even alleged, in the present case. A judgment has priority over an unrecorded mortgage, even when the plaintiff in the judgment had actual notice of the existence of the mortgage. Jaques v. Weeks, 7 Watts, 261; M'Lanahan v. Reeside, 9 Watts, 508, 36 Am. Dec. 136.

Reigart's Appeal, 4 Pa. 477, a case of an assignment for creditors—not recorded in the county where the assignee resided—was ruled void as to creditors.

In Dougherty v. Darrach, 15 Pa. 399, an assignment for creditors had been recorded in the county in which the assignor resided, but not in the county where the land was located, and it was ruled void as to a purchaser without notice.

A judgment against a partnership or firm, and not indexed against the individual members of the firm, creates no lien against them, not even when entered against such members of the firm, if the Christian names are omitted. York Bank's Appeal, 36 Pa. 458; Smith's Appeal, 47 Pa. 128.

There is a vast difference in the legislation directing the recording of mortgages, judgments, and mechanics' liens. No particular book is designated for the two former. But for mechanics' liens the act is specific as to the book and mandatory as to the things required to be done. Glading v. Frick, 88 Pa. 460.

Irish v. Harvey, 44 Pa. 76, decides only that a lien is good between the parties although not indexed. Had there been a mortgage or judgment the ruling would have been different.

Frank Fletcher for appellees.

Opinion by Mr. Justice Trunkey:

The mortgage was executed on July 14, 1885, to Daniel Cessna, trustee, who had no interest in it, and who assigned the whole of it to the persons who loaned the money to the mortgagor. John Cessna, president of the corporation, was the active party in procuring the loan, and the auditor finds that he "was not attorney for the Franklin & Marshall College, or any of the others taking parts of the mortgage," but he induced them to take the same. The last assignment was made August 22, 1885, to John A. Gump.

After the sheriff's sale Daniel Cessna purchased the claim of the Watertown Steam Engine Company, thereby acquiring an interest adverse to the assignees of the mortgage, and because that claim was "left unpaid at the time of the making of the mortgage and the fact was known to the mortgagee, and there being no objection to it by the mortgagee, the claim is allowed to participate in the fund."

That the mortgagee who never was actually interested in the mortgage, and who now owns the mechanics' claim, should not

object is not very singular. Surely, his conduct since the assignment ought not to prejudice the assignees.

The mechanics' claim was filed December 10, 1885, and had it been indexed the lien would have continued against subsequent lien creditors. Here there is no question of the continuance of the lien against the owner of the building, or against a creditor who had notice that the claim was filed. There is no evidence that the owners of the mortgage had notice. The docket is the only thing which affects encumbrancers and purchasers. Armstrong v. Hallowell, 35 Pa. 485.

Had the encumbrancers looked at the proper docket they would not have found the claim. They were not bound to search through the docket for a claim, when there was nothing in the index to show its existence. Although there was a lien for the debt owing to the Watertown Steam Engine Company, at the date of the assignments of the mortgage, filing the claim was necessary to keep it alive.

Without actual or constructive notice that the claim had been filed, the assignees cannot be postponed in favor of such claim in the distribution of the proceeds of the sheriff's sale. They are not under the necessity of showing that they would have bid more for the property had they known of the lien. Their action is presumed to have been based on the record, of which they were bound to take notice. The mere fact that there was a valid claim and lien against the defendant in the execution does not prejudice a creditor or purchaser.

Decree reversed, and it is now considered that $4,866.06 be appropriated *pro rata* to the assignees in the case of Daniel Cessna, Trustee, v. Everett Glass Co., and the balance of the fund to costs as set forth in the decree of the court below. Costs of appeal to be paid by appellees.

Record remitted.

William Bates, Plff. in Err., *v.* W. P. Wynn, For the Use of G. B. Webber.

A purchaser of land who retains a portion of the purchase money to se-

NOTE.—In Harper v. Hays, 18 Pittsb. L. J. 180, under similar facts, the same ruling was made. These cases are to be distinguished from those in which the contract provides for deferred payments, no provision being made

cure the removal of encumbrances by the vendor is, in the absence of agreement as to the interest, liable for the interest on the amount so retained.

(Argued May 26, 1887. Decided October 3, 1887.)

July Term, 1887, No. 93, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Warren County to review a judgment for the plaintiff on demurrer to the defendant's plea in an action of scire facias to revive a judgment. Affirmed.

The facts as alleged in the plea and admitted by the demurrer are stated in the opinion of the court below, which was as follows:

Defendant Bates purchased of the legal plaintiff real estate. Deed was made and possession taken. The judgment on which sci. fa. is issued was for the balance of purchase money, and was due June 1, 1880.

The defendant's plea, as amended, alleged that the amount due on this judgment, or rather the principal thereof, should not draw interest from the time it fell due until about the 5th of March, 1884. This is based upon the averment that at the time of the purchase of the land there were certain charges and encumbrances thereon (as we understand about equal to the amount of this judgment), and that it was agreed that defendant Bates should retain sufficient of the purchase money to protect him from such charges and encumbrances. The plea avers a legal tender of payment of the principal of the judgment on or about the 5th of March, 1884, and a demand for a removal of the encumbrances; that on the 10th of October, 1885, the encumbrances, etc., having been removed, the principal of the judgment, $761, was paid to plaintiff with costs.

The only question raised by the plea and amendment thereto is whether the facts alleged therein, taken as true, exempt the defendant Bates from the interest on the judgment from June 1, 1880, to March, 1884,—the plaintiff's attorney on the argument only claiming the interest from that time.

We are of the opinion that the facts alleged cannot avail the

for interest. In such case it is not chargeable. Sankey v. Kerr, 25 Pittsb. L. J. 171; Minard v. Beans, 64 Pa. 411; Nettleton v. Caryl, 3 Lack. Legal News, 207. See also Fleming's Estate, 184 Pa. 80, 39 Atl. 27; Booth v. Pittsburgh, 154 Pa. 482, 25 Atl. 803.

defendant. The position is analogous to the cases found in the books where a court of equity interposes to protect a defendant from liens on land he has purchased, and in which the courts hold that it is inequitable that the vendee of land should hold both land, and the price, and compensate for neither. Minard v. Beans, 64 Pa. 414; M'Cormick v. Crall, 6 Watts, 207; Kester v. Rockel, 2 Watts & S. 365.

That the plaintiff here had agreed that defendant might retain the money to protect himself from the liens, etc., we think makes no difference. This seems to have been distinctly ruled in the case of Shaller v. Brand, 6 Binn. 435, 6 Am. Dec. 482, in which case it was expressly agreed that no execution should issue until the plaintiff had perfected title to the land which was the consideration of the judgment, but nevertheless the supreme court held the debt liable for interest during the time the title remained unperfected.

There is a marked difference between a judgment, the payment of which is conditioned on the removal of encumbrances or the perfecting of title, and an absolute judgment, the collection of which cannot be presently enforced by reason of a stipulation of the parties for stay of execution.

February 14, 1887, judgment, in favor of the plaintiff on the demurrer to the plea, is directed to be entered against the defendant for the sum of $171.72, and costs.

The assignments of error specified the judgment.

D. I. Ball and *C. C. Thompson,* for plaintiff in error.—Interest is the sum agreed upon for the use of money, or it is the compensation allowed by law where the payment of money is wrongfully withheld after it ought to be paid. Brown v. Campbell, 1 Serg. & R. 176; King v. Diehl, 9 Serg. & R. 409, 422; Easton Bank v. Com. 10 Pa. 453; Koons v. Miller, 3 Watts & S. 271.

Two things must necessarily pre-exist to raise the duty on part of the debtor to pay interest,—*viz.,* the ascertainment of the amount to be paid, and its maturity. Kelsey v. Murphy, 30 Pa. 341; Minard v. Beans, 64 Pa. 413; West Republic Min. Co. v. Jones, 108 Pa. 69.

In cases of articles of agreement, long past due, where the purchaser was in possession of the premises, he has been allowed to defend against the payment of interest, or the question was referred to the jury. Fasholt v. Reed, 16 Serg. & R. 266; M'Cor-

mick v. Crall, 6 Watts, 207; Kester v. Rockel, 2 Watts & S. 371.

A contract is to be enforced according to its terms. Nelson v. Von Bonnhorst, 29 Pa. 352; White v. Smith, 33 Pa. 186, 75 Am. Dec. 589.

Johnson, Lindsey, & Parmlee, for defendant in error.—The sole question is whether the purchaser of an improved farm, who went into immediate possession and enjoyed the use and profits of the farm, should pay interest on the balance of the purchase money due, and withheld by him, to protect himself against encumbrances, by agreement with the vendor.

Where lands are sold on articles of agreement, and the buyer enters into possession, and so continues undisturbed, he must pay interest; and the mere fact that his deed was not made at the time agreed upon does not stop the interest. Fasholt v. Reed, 16 Serg. & R. 266.

It would be grossly inequitable that the vendee should hold both land and money and compensate for neither. There is an obligation to pay interest, although the purchase money is not recoverable. Minard v. Beans, 64 Pa. 411.

PER CURIAM:

The judgment in this case is affirmed, for reasons given in the opinion of the learned judge of the court below.

D. W. Woods's Appeal.

A legacy charged on land and payable at a certain date, but in fact unpaid at the death of the legatee, and by the legatee bequeathed for life, in a general gift of all property real, personal, and mixed, to the devisee of the land, and after his death to his children absolutely, remains a first lien, to the amount of principal and interest unpaid when last bequeathed, although the payment of interest is suspended during the ownership of both land and legacy by the devisee.

Upon a sheriff's sale of the land on a judgment against the devisee his interest in the legacy does not pass to the purchaser, although the lien of the legacy is discharged and thrown upon the proceeds.

In such a case it is proper for the court to direct the purchaser to retain out of the proceeds the corpus of the legacy and declare him a trustee to pay the interest on the legacy to the devisee for life, and the principal to his children.

Notice given by a first lien creditor at a sheriff's sale that the land will

be sold subject to his lien will be inoperative to prevent the discharge of the lien if the sheriff disregards the notice and does not make the retention of the first lien a condition of the sale upon a subsequent judgment.

(Argued May 26, 1887. Decided October 3, 1887.)

July Term, 1887, No. 70, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Common Pleas of Mifflin County distributing the proceeds of a sheriff's sale of real estate in execution. Affirmed.

Before James S. Rakerd, Esq., the auditor to distribute the proceeds of the sheriff's sale of the real estate of William R. Graham, including land in Granville township, in execution of judgments held by D. W. Woods and others, the following facts appeared:

The land in Granville township was devised to William R. Graham by his father, John Graham, who died in August, 1855, upon, *inter alia,* the condition that William should pay "$200 to my daughter, Mary Jane, her heirs, and assigns, in five years after my decease or the decease of his mother, if she survives me; and to the same, $200 more in six years after my decease or the decease of my wife, if she survive me."

Mary Jane Foster, the daughter referred to by the testator, died in 1882, having never received any part of the $400 bequeathed to her, or interest thereon, and by will provided:

"I hereby give, devise, and bequeath to my brother, William R. Graham, of said county, all property I may have at the time of my decease, whether real, personal, or mixed, and all goods, chattels, rights, credits, choses in action, legacies, or other moneys or properties then belonging or coming to me, to be used and enjoyed by him during the term of his natural life, and at his death to descend to and become absolutely the property of his children, share, and share alike, said Graham to have no other or greater interest in said property above stated than the right to use and enjoy the same during his natural life."

At her death the original $400 of legacies, with its accumulated interest, amounted to $901.60.

Upon the sale the residuary legatees by their attorney notified the sheriff that the sale was subject to their lien, but he disregarded the notice and sold without qualification.

The proceeds of the land were $1,385.

The auditor reported the following distribution:

To *pro rata* share of costs of sale and audit.....	$59 17
To the two legacies of Mary Jane Foster, for $200 each, bequeathed in will of John Graham, deceased, and being the first lien on the said tract, with interest.....	901 60
To mortgage of Charles K. Davis, now for use of D. W. Woods, entered April 1, 1867, on account debt and interest.....	424 23
	$1,385 00

Seven exceptions to the report of the auditor were filed. They specified the refusal of the auditor to find that the Granville township tract was sold subject to the lien of the legacies in favor of Mrs. Foster; that the interest in said legacies did not pass to Mr. Woods, the purchaser of the land, at sheriff's sale; that the auditor should have found as a fact that the interest on said legacies was paid up to the death of Mrs. Foster; and that he erred when he appropriated the corpus of the legacies to the remaindermen under the will of Mrs. Foster.

In the court below BUCHER, P. J., after stating the facts, delivered the following opinion:

The facts found by an auditor must stand unless plain and palpable error be shown. We must, therefore, accept the findings of the auditor that the corpus of these legacies, with the accumulated interest at the death of Mrs. Foster, amounts to $901.60. This is the primary lien, and was discharged by the sheriff's sale. Although a charge on the land originally, it does not follow that the will of Mary Jane Foster giving the interest to William R. Graham rendered the time of payment uncertain so as to continue it as a fixed lien. On the contrary, it was not affected by her will, and was discharged as a lien, and it is now payable to the estate of Mary Jane Foster, to be administered according to her will. The fact that she mentions legacies in her will does not constitute a specific bequest, but is used as descriptive of the extent of her gift rather than its kind. The notice by anyone other than the sheriff and parties in interest, that the

land was selling subject to the lien, does not prevent its discharge.

In Barnet v. Washebaugh, 16 Serg. & R. 410, it is held that the lien of legacy will be discharged unless it appears expressly that it was the clear understanding of all parties that it was to remain on the land. Mere notice or loose declarations were pronounced insufficient for that purpose, and this was afterwards reiterated in Hellman v. Hellman, 4 Rawle, 440, and kindred cases.

But Mr. Woods did not buy subject to the legacies; *i. e.*, he was not to pay the legacy in addition to his bid of $1,385, but the legacy was to be deducted and remain in the land. Why should this be done in so uncertain a way? The court might appoint Mr. Woods a trustee to receive the $901.60 and pay the interest annually to William R. Graham; then all will be plain and readily understood. The auditor held that the sheriff's sale extinguished the interest of William R. Graham in the legacies. We do not see how this conclusion is reached. The sheriff's sale devested Graham's title to the land, but in no wise carried his interest in the legacies under his sister's will. The fact that the legacies were a charge on the land sold was not sufficient had a judgment on the land been bequeathed instead of a legacy. The legacy was not a final lien. The executor of the sister's will could have collected the legacies and invested the moneys elsewhere and paid Graham the interest. The accrued interest up to Mrs. Foster's death became principal—was the fund on which he drew the interest. Then how did the sheriff's sale affect Graham's interest under his sister's will? The interest accruing between the sister's death and the sheriff's sale was extinguished by operation of law, because he owed it to himself. Until creditors seize Graham's interest in his sister's estate, by due course of law, he still owns it. His land was sold, but not his interest in his sister's estate. The latter was never levied upon. It could not be sold by any such process as sold the land. It could only be sequestered. Coover's Appeal, 74 Pa. 146; Brown's Appeal, 27 Pa. 62; Styer v. Freas, 15 Pa. 339, and that class of cases merely decides that where a sale is postponed for the benefit of a life tenant, and the tenant declines the gift, or refuses to take under the will when a widow, the sale may take place immediately, because there is then no reason to preserve the estate for the life tenant.

Koenig's Appeal, 57 Pa. 352, only determines that a trust created for the benefit of a married woman becomes inactive and ceases upon her discoverture, by divorce or death of her husband, the trust being no longer needed. So, too, in Dodson v. Ball, 60 Pa. 493, 100 Am. Dec. 586, and many others.

But we are unable to see the application of these principles to the case in hand, there being in no sense a similarity of expression or purpose. All the preceding and cited cases destroyed no interest, extinguished no right; but the proposition insisted on here—namely, that the trust in William R. Graham, under his sister's will, falls because it so happens that as to $901 of corpus on which her brother, William R. Graham, was to receive the interest for life happened at the time of the making of her will to be charged on William's own lands (and hence the interest thereon was payable by himself to himself); that a change in the form of the corpus, by the sheriff's sale, which converted the charge into cash, merely substituting the money for the land, without his consent and by operation of law, put an end to his interest in the bequest, deprived him of all future benefit therein, and rendered the corpus without delay payable to the remaindermen—is not only not supported by the cases cited, but is contrary to the reasonable sense of mankind, and would be utterly destructive of the benevolent purposes of his sister, Mrs. Foster.

William R. Graham, just in his direst calamity, when the life estate in the fund is of supreme importance to his daily maintenance, is to be deprived of his sister's bounty. The principle of merger does not apply. That is a question of intention; and as Graham did not own the corpus, but the interest only, the interest could not merge into what Graham did not own. Had he become the owner of the corpus the merger would extinguish both interest and principal. There is no trust in the technical sense. There is simply a bequest of interest in the personal estate of the testator to her brother for life. Suppose a stranger had owned this legacy and the interest had been given to Graham for life; it would not be pretended that a sheriff's sale of the land charged would in any manner extinguish the interest. And no more does merger take place here, except that while Graham owned the legacy he was entitled to the annual interest; and as he need not pay to himself, the law extinguished it. How long was Graham to profit by the bequest of his sister? Until

he died and not until he was sold out by the sheriff. The descent is to be cast at his death, not when he became bankrupt.

It is clear, then, that the first appropriation filed by the auditor is what he conceives to be correct, and as that opinion is correct, except that he held that the children of William R. Graham were entitled to have uninterruptedly, without waiting for the death of their father, the $901.60 of the legacies; and in this we overrule him, and hereby appoint D. W. Woods, Esq., trustee to receive said $901.60 from himself or from the sheriff, if already paid to the latter, the interest whereof he shall pay to the said William R. Graham annually during his life, and the principal to his children, as described by the will of Mrs. Jane Foster, he to give security, to be approved by the court. As to the balance of the fund, it is hereby ordered to be paid out to the respective parties entitled, as found by the auditor and set forth in his first scheme of distribution, and his report as thus corrected is hereby confirmed absolute, unless an appeal be taken within twenty days.

The assignments of error specified substantially the same errors as the exceptions.

Andrew Reed and *D. W. Woods & Son,* for appellant.—William R. Graham cannot take anything out of the proceeds of the sale of his real estate adversely to his mortgage creditor. When his sister, Mrs. Foster, bequeathed to him the interest of the legacy, charged on this land during his life, it freed him from paying any interest so long as he lived. It then became, in the nature of a judgment in favor of the residuary legatees, payable, without interest, to them on the death of William R. Graham.

At law, the lien of the owner merges in the property, since no man can be both debtor and creditor; and equity will not uphold it in order to place in the hands of the owner himself a portion of that fund which ought to go to his creditor, whose debt was contracted on the faith of the fund. Babb v. Reed, 5 Rawle, 159, 28 Am. Dec. 650; Gilkeson v. Snyder, 8 Watts & S. 200; Koons v. Hartman, 7 Watts, 20; Loverin v. Humboldt Safe Deposit & T. Co. 113 Pa. 6, 4 Atl. 191.

The residuary legatees under the will of Mrs. Foster could not have any greater interest in this legacy by the sheriff's sale than her will gives them. We concede that the lien of the legacy is

devested by the sheriff's sale, unless the notice they gave at the sale estops them.

Where a bidder at a sheriff's sale of real estate announces that the property will be sold subject to his lien, and he purchases the property at a greatly reduced price, he will be estopped from participation in the distribution of the fund. Birney's Appeal, 114 Pa. 519, 7 Atl. 150; Power v. Thorp, 92 Pa. 346.

Now, if a bidder is thus estopped, why not a lien creditor? But even if the facts are not sufficient to work an estoppel, then the purchaser, who is the mortgage creditor, being willing to hold this fund and pay the same over to the residuary legatees of Mrs. Foster on the death of William R. Graham, equity will impound the money until this event happens, on proper security being given by Mr. Woods.

Horace J. Culbertson, for appellees.—No loose declarations or notices made at the time of the sale amount to an agreement that the land shall be sold subject to the lien of the legacy. Barnet v. Washebaugh, 16 Serg. & R. 414; Hellman v. Hellman, 4 Rawle, 440.

In Birney's Appeal, 114 Pa. 519, 7 Atl. 150, Barker, the lien creditor, gave notice that the property would be sold subject to his lien; and he himself was the purchaser, at a greatly reduced price (his purpose being to secure the property much below its value, to the detriment of the defendant); and the case is not in point here.

If the interest of Graham in his sister's estate were ended and determined, as appellant claims, then clearly the sum of $901.60, the corpus, would be payable presently to Graham's children, to wit, John A. Graham, Mary C. Banks, and Elizabeth Graham, on the authority of Coover's Appeal, 74 Pa. 146, and Koenig's Appeal, 57 Pa. 352.

OPINION BY MR. JUSTICE GREEN:

It seems almost unnecessary to add anything to what has been so well said by the learned court below in this case. The two original sums of $200 each given by the will of John Graham to his sister, Mrs. Foster, were not continuing liens in any sense, nor were they payable at an uncertain time nor upon an uncertain event. They were absolutely payable in August, 1860 and 1861. From those dates they became a fixed and determined

debt due to Mrs. Foster and were charged upon the land. Of course, they bore interest until Mrs. Foster's death; and the aggregate of principal and interest at that time was a distinct asset of her estate and subject to her disposition by will or otherwise. If she had seen fit to give it to a stranger, either for life or absolutely, there could have been no question as to the correctness of the principles applied by the court below.

We can see no reason for making any distinction because she chose to give it to her brother who happened to be the former owner of the property affected by the charge for the payment of the money. That charge simply made this debt a lien on the land. It was of record; it was prior to all other liens, and it was devested by the sheriff's sale. Both the auditor and the court below have found that it was devested and that the land was not sold subject to this lien. If it had been, the purchaser would have been obliged to pay this debt, in addition to the amount of his bid; and there is no evidence to support such a claim. While notice was or may have been given of it at the sheriff's sale, the sheriff simply disregarded it and made no contract or condition with reference to it. By operation of law, the lien of this debt was, therefore, devested, and it would be payable out of the proceeds; but by the terms of Mrs. Foster's will the interest of this sum is payable to William R. Graham during his life; and there was no impropriety in securing the payment both of the interest and principal, precisely as was done by the learned court below.

It is confusing both ideas and authorities to argue that because William R. Graham was the owner of the land bound by the lien of this debt, it was extinguished in any part because of such ownership. During his ownership the money was payable, not to him, but to Mrs. Foster; and of course, there was no merger, except as to interest after her death. After the sheriff's sale he was not the owner, but a stranger was; and hence, again, there could be no merger and no extinguishment. But by the legal effect of the sale William R. Graham paid the whole amount of the debt, principal and interest, and then the aggregate sum, which properly, perhaps, would go to Mrs. Foster's legal representative to be administered according to her will, became subject to such disposition by the court as would effectuate the intent of the testatrix. Practically, the order of the court below was an investment of the money in accordance with the

will of Mrs. Foster; and in this there was no error. We see no mystery in the case and regard it as quite plain.

Decree affirmed.

J. B. McElwaine, Owner, etc., Plff. in Err., *v.* Charles Brown.

A grant under seal to several persons, their heirs and assigns, of the exclusive right to bore or mine for oil or minerals on premises owned in fee by the grantor "to have and to hold the said rights and privileges hereunto granted, with the appurtenances, unto the said parties of the second part, their heirs, executors, administrators, and assigns for twenty years, or so long as the said parties of the second part use it for the purpose of producing oil or minerals or gas," passes only a leasehold estate.

Such an estate is subject to the special lien law of April 8, 1868, P. L. 752.

(Argued May 25, 1887. Decided Oct. 3, 1887.)

July Term, 1887, No. 24, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Error to the Common Pleas of Warren County to review a judgment on a verdict for the plaintiff in an action of scire facias sur mechanics' lien. Affirmed.

This was a mechanics' lien filed February 27, 1886, by Charles Brown against a leasehold described by metes and bounds in Mead township, Warren county, and the property, fixtures, and improvements described, for $257.25, the price of seventy-three and a half days' labor at drilling, done upon the leasehold within the preceding thirty days for J. B. McElwaine, owner or reputed owner, and Milo White, contractor.

McElwaine held the premises by assignments to him, his heirs, and assigns, from H. P. Ridlesperger and others, lessees of J. K. Weaver by lease dated November 5, 1883, duly acknowledged and recorded.

This instrument, for a consideration therein specified, leased to the lessees, "their heirs and assigns, the exclusive right to bore or mine for Seneca oil or other minerals" on the premises, and proceeded as follows:

NOTE.—The right to file a mechanics' lien under this act was affirmed in Harley v. O'Donnell, 9 Pa. Co. Ct. 56, under a similar grant of the right to produce oil, so long as it should be found in paying quantities.

"Also the right to enter upon said premises, and occupy the same, or so much thereof as may be necessary to prospect, bore, mine, or otherwise search for, find, and procure Seneca oil or minerals, or gas, and as may be necessary for the erection of machinery, store houses, or other needed buildings, and the right to construct necessary roads to and from said buildings or premises, and the use thereof. Also the right to divide or subdivide into as many shares, parts, or subdivisions, either by undivided interests or by division and measurement on the ground, as the parties of the second part may elect, and the same to sell, assign, or transfer at pleasure.

"To have and to hold the said rights and privileges hereunto granted, with the appurtenances, unto the said parties of the second part, their heirs, executors, administrators, and assigns, for twenty years, or as long as the said parties of the second part use it for the purpose of producing oil or minerals, or gas; but if abandoned, said land to revert back to the party of the first part, their heirs, and assigns, but the parties of the second part to have the privilege of removing any buildings, machinery, etc., which they may have erected."

The act of assembly of April 8, 1868, P. L. 752, under which the plaintiff below claimed the right to file the lien, is as follows:

"Sec. 1. All persons furnishing materials for or about the erection, construction, or repair of any engine, engine-house, derrick, tank, machinery, or wood or iron improvement, or for or about any building which may be constructed, erected, or repaired upon any leasehold, lot or parcel of ground or material furnished, necessary for the improvement or development thereof, held by written lease for any term of years, and which shall or may be so constructed, erected or repaired by the tenants or lessees of said leased estate, or for them or for their use and benefit, shall have a lien upon all such engine or engines, material, machinery, buildings, tanks, wood or iron improvements, as may be upon or pertaining to said leasehold, lot or parcel of ground at the time such claim may be filed, as hereinafter provided, together with the lease, lot or parcel of ground on which the same is situated for the price and value of the materials so furnished; Provided, That the lien hereby given shall extend only as to such lease or lot to the interest of the lessee or lessees, tenant or tenants therein.

"Sec. 2. That all persons doing work for, on or about the erec-

tion, construction or repair of any engine, engine-house, tanks, derricks, building, machinery, wood or iron improvement, erected, constructed or repaired upon any leasehold estate as aforesaid, or for boring, drilling or mining on said lease or lot, for the development or improvement of the same, whether such labor is or may be done by the day, month or year, or by contract, for the tenant or tenants, lessee or lessees of such lot or lease of parcel of land, or for their use and benefit, shall have a lien upon the personal property and fixtures on said lot or lease of ground, and upon such lot or leasehold itself, for the price and value of such work and labor: Provided, That such lien shall extend as to said lot or leasehold only to the interest of the tenant or tenants, lessee or lessees thereon: Provided, further, That this act shall not apply to debts such as aforesaid, where the same is of less amount than $25."

At the trial the verdict was for the plaintiff for $272.68, subject to a reserved point as to whether the interest of McElwaine was such as to be subject to the lien under the act of 1868.

Upon entering judgment for the plaintiff on the point reserved the court below filed substantially the following opinion:

The lien filed is for work and labor under the provision of § 2 of "an act relating to the liens of mechanics, materialmen, and laborers upon leasehold estates and property thereon in the county of Venango" (P. L. 1868, p. 752), extended to Warren county. P. L. 1869, p. 410.

The question reserved is whether the lease or agreement from J. K. Weaver to Ridlesperger and others given in evidence and dated November 5, 1883, vested such an interest in the lessees and those holding under them as to render the same subject to plaintiff's lien.

By the agreement the lessees acquired nothing but the right to work the land for oil, minerals, etc. They acquired no estate in the land or minerals; the right was to search for oil, etc., and if found to take it, rendering the one eighth to the lessor. 53 Pa. 229. Thompson's Appeal, 101 Pa. 232.

By whatever name the rights of the lessees may be designated, it seems clear that they have not, as defendant claims, any freehold estate in the premises. They have the right to occupy so much of the land as is necessary in prosecuting the work of finding and producing oil and minerals, including the erection of

buildings and machinery and the building of roads. This right, unless abandoned, is to continue to the lessees, their heirs, executors, administrators, and assigns for the term of twenty years, or "as long as said parties of the second part use it for the purpose of producing oil or minerals or gas."

Under the words quoted the defendant claims that the right of the lessees may extend beyond the twenty years and for the life of the original lessees; and hence that the interest is not such a leasehold estate as is subject to lien under the act of 1868.

In support of this claim we are referred to numerous decisions wherein language of similar import has been held to vest an interest in the lessee greater than a leasehold. Also to decisions of our own supreme court holding that a lease for a given number of years, with an added agreement that the lessee shall have a right to purchase on specified terms, vests in him such an interest as is subject to judgment and mechanics' lien under the act of 1836. If it be conceded that under the lease or agreement in this case the lessees take an interest of the nature of a freehold, and such as would be bound by the lien of a judgment, we do not think it follows that the agreement may not be also regarded as a lease for years. Had Weaver, by one paper, leased the premises to Ridlesperger for the term of twenty years, and by another stipulated that if he continued the same for the purpose of producing oil, he should have it for life, could it be claimed that the last paper destroyed or even qualified the first? And if not, is not the case the same when the two agreements are in one paper?

In the case of a lease for years, with a right in the lessee to purchase, we think liens may be entered against both the leasehold and the equitable right of purchase,—that is, by a laborer under the act of 1868 against the leasehold and property thereon, and by the mechanic and materialman under the act of 1836 against the equitable right to purchase.

Upon the question before us we treat the agreement in suit as a lease for twenty years—subject, it is true, to continue for such indefinite time longer as the lessees use it for the purpose of producing oil, etc., but none the less a leasehold estate.

In the case of Dame's Appeal, 62 Pa. 417, Justice SHARSWOOD, commenting on the very act of 1868, under the provisions of which the lien in suit is entered, says the act is not "a penal but a remedial one, and should have a fair and liberal interpre-

tation in advancement of the remedy contemplated and provided by the legislature."

Taking into consideration the law as it stood before the act of 1868, and the security the act was intended to give the laborer for his work (especially for the boring, drilling, or mining for oil, etc.), we are inclined to the belief that the act gives to the laborer a lien in all cases where the lessee has the exclusive right to occupy for mining purposes only, upon terms of rendering a certain part of the proceeds as royalty or rent, and this whether such right is limited to a specified number of years, or is unlimited in duration; but we do not think it necessary to decide this in the matter pending.

And now, March 28, 1887, on payment of the jury fee the prothonotary will enter judgment on the verdict in favor of the plaintiff.

The assignments of error specified the action of the court in not striking off the lien, and in entering judgment on the verdict.

Samuel T. Neill, for plaintiff in error.—The lien as filed does not comply with the act of assembly, in that it fails to state that which is a proper matter of description, to wit: the character of the term held by the defendant. What kind of a leasehold is nowhere stated in the lien as filed, whether held by written lease or by parol does not appear, whether for "term of years" or at will is only a matter of inference. The lien filed should, upon its face, be self sustaining. This lien law is a proceeding purely statutory, and in derogation of the common law; and the lien itself, like the complaint in a landlord and tenant proceeding, should show everything necessary to support it. Leinbach v. Kaufman, 1 Sad. Rep. 12, and cases cited.

The estate of the defendant is not a chattel interest merely and within the terms of the act of assembly. A lien upon a freehold cannot be sustained under the act. Dorsey's Appeal, 72 Pa. 192.

While in Dame's Appeal, 62 Pa. 417, words were used from which it can be said this special lien law should receive a liberal construction, yet from the facts of that case a most rigid construction was put upon the act by this court.

Esterley's Appeal, 54 Pa. 192, held that all such acts should receive a strict construction.

While the word "lease" is used in the premises of this deed, it has been decided that such use of words has no controlling influence. Delaware, L. & W. R. Co. v. Sanderson, 109 Pa. 583, 58 Am. Rep. 743, 1 Atl. 394.

The chattel interest defined in the *habendum* is not only inconsistent with that mentioned in the granting clause in the premises, but inconsistent with the alternative interest defined in the *habendum* itself. The word "heirs" is always the operative word in creating a fee, and being found in this conveyance in the premises or granting clause, it controls and determines the character of the estate. 2 Bl. Com. 298; Wager v. Wager, 1 Serg. & R. 374; Tyler v. Moore, 42 Pa. 387.

The farthest the rule has been carried by which an estate in fee in the premises has been reduced in the *habendum* is the case of Moss v. Sheldon, 3 Watts & S. 160, where the fee was reduced to a freehold not of inheritance.

The term "twenty years" must be disregarded. If the duration of a tenancy is left optional, by the terms of the lease, without saying at whose option, it means at the option of the lessee who has the right of choosing; and in all cases of uncertainty the tenant is most favored by law. Taylor, Land. & T. § 81; Arms v. Burt, 1 Vt. 303, 18 Am. Dec. 680, cited in 1 Am. Lead. Cas. Sharswood & B.'s ed. p. 54.

The estate created by the term "as long as said parties of the second part use it for the purpose of producing oil or minerals or gas" is a conditional fee. Hurd v. Cushing, 7 Pick. 169; Folts v. Huntley, 7 Wend. 210; Effinger v. Lewis, 32 Pa. 370. See also 18 Pick. 527; Kier v. Peterson, 41 Pa. 357; Funk v. Haldeman, 53 Pa. 229; Thompson's Appeal, 101 Pa. 232; Scheetz v. Fitzwater, 5 Pa. 126, 2 Am. Lead. Cas. Sharswood & B.'s ed. p. 11.

"A base or qualified fee is such a one as has a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end." 2 Bl. Com. 109.

"A proprietor of a qualified or base fee has the same rights and privileges over his estate till the contingency upon which it is limited occurs, as if he were tenant in fee simple." Walsingsham's Case, 2 Plowd. 557, cited with approval in Chitty's Notes on Blackstone.

The grantee had, by this conveyance, more than a chattel

interest; they had a freehold. Their estate was subject to the lien of a judgment. Ely v. Beaumont, 5 Serg. & R. 124.

And hence there is no necessity for giving these mechanics' lien creditors a special lien.

If, however, it is thought that this estate for years under the terms of this lease still remains in these grantees with the right of acquiring a freehold superadded thereto, it is still doubtful about the right to file a leasehold lien. Gaule v. Bilyeau, 25 Pa. 523.

A mechanics' lien can only be given by virtue of express terms of an act of assembly. It cannot be given or extended by judicial construction. Hancock's Appeal, 115 Pa. 1, 7 Atl. 773.

O. C. Allen and *Geo. H. Higgins,* for defendant in error.—No precise form of words is necessary to constitute a lease; any words which show an intent to convey by their own operation the possession of certain specified land for a limited time will suffice to create a term of years. 2 Am. Lead. Cas. Sharswood & B.'s ed. pp. 30, 37, 42; Watson v. O'Hern, 6 Watts, 362; Moore v. Miller, 8 Pa. 283; Offerman v. Starr, 2 Pa. St. 394, 44 Am. Dec. 211; Greenough's Appeal, 9 Pa. 18.

The privilege granted in the premises by the instrument in question is the exclusive right to bore or mine for Seneca oil or other minerals. "Also the right to enter upon said premises, and occupy the same or so much thereof as may be necessary to prospect, bore, mine, or otherwise search for, find, and procure Seneca oil, or minerals, or gas," etc.

This clearly does not give the lessees any interest in the oil, gas or minerals until they are brought to the surface. Thompson's Appeal, 101 Pa. 225; Funk v. Haldeman, 53 Pa. 229; Johnstown Iron Co. v. Cambria Iron Co. 32 Pa. 241, 72 Am. Dec. 783; Offerman v. Starr, 2 Pa. St. 395, 44 Am. Dec. 211.

A deed must be so construed, if possible, that no part shall be rejected. Tyler v. Moore, 42 Pa. 374.

The object of all construction is to ascertain the intent of the parties, and it must have been their intent to have some meaning in every part. Wager v. Wager, 1 Serg. & R. 374.

In answer to the first assignment of error, *viz.,* "That the court erred in not striking off the lien filed in this case," we say that it is not a final judgment, but only interlocutory, and a writ of error does not lie. Keemer v. Herr, 12 W. N. C. 90.

PER CURIAM:

The agreement of November 5, 1883, was, by the court below, properly held to be a lease, and that the premises were subject to the special lien act of April 8, 1868.

Judgment affirmed.

Pennsylvania Schuylkill Valley Railroad Company, Plff. in Err., v. Jefferson M. Keller.

The grant of a right to use the water of a pond "to get ice in winter time and to make ice cream in summer time" gives the grantee the right to cut ice for sale.

In proceedings to assess damages for the construction of a railroad through a pond from which the plaintiff has the right to get ice, evidence that the water of the pond was foul and unfit for ice is admissible to show the value of the right destroyed.

In proceedings to assess damages for land taken or injured by a railroad company in the construction of its works it is incumbent on the plaintiff to show title to the property appropriated, and its fair market value. The railroad company, on the other hand, may show that the plaintiff does not own all the property, or that his claim is excessive.

(Argued February 28, 1887. Decided October 3, 1887.)

January Term, 1886, No. 265, E. D. All the Judges present. Error to the Common Pleas of Berks County to review a judgment on a verdict for the plaintiff in an appeal from an award of viewers. Reversed.

In the court below this was an appeal by the Pennsylvania Schuylkill Valley Railroad Company from the award of $16,000, by viewers to assess the damages caused by the construction of its road through an ice house, lot of ground and an adjoining pond on which Jefferson M. Keller, who claimed to be the owner in fee of the ice house and ground, claimed also, in fee, the right, by grant from the owner of the land to Huber and Weis, Keller's grantors, to get ice in winter, and to make ice cream in summer.

NOTE.—As to construction of grant of right to cut ice, see Farnham, Waters, p. 1604. As to measure of damages for injury to ice, or wrongful taking there of, see Farnham, Waters, p. 1606.

By agreement of counsel the cause was put at issue under the form of an action of assumpsit, and was tried upon the general issue—Keller as plaintiff taking the affirmative of the issue.

At the trial the plaintiff proved his title to the land and the grant of the right to cut ice, and introduced evidence of the damage caused by the construction of the railroad.

The court refused to admit evidence on behalf of the defendant or to charge that the grant of the right to get ice was for the purpose of manufacturing ice cream only (first, second, third, and fourth assignments of error); refused to admit evidence that the water of the Union canal which backed into the pond was too filthy to be suitable for making ice (fifth and sixth assignments of error); or that the condition of the Union canal was such as to indicate its early abandonment (seventh, eighth, ninth, tenth, eleventh, and twelfth assignments of error); admitted on behalf of the plaintiff a map made by a surveyor upon an actual survey of the ground for the purpose of describing the location (thirteenth assignment of error); refused to admit evidence on the part of the defendant that part of the premises claimed by the plaintiff was not included by the descriptions in his deeds (fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, and nineteenth assignments of error); refused to charge that the plaintiff had no right to sustain the level of the pond by a dam if the Union canal should be drawn down (twentieth assignment of error).

The rulings of the court below which were the subjects of the remaining (twenty-first to thirty-ninth) assignments of error are summed up in the opinion.

Verdict and judgment for the plaintiff for $17,485.13.

Isaac Hiester and *Cyrus G. Derr*, for plaintiffs in error.—Keller's rights upon the pond in question arose under the grant to his predecessors, Huber and Weis, of the "right and privilege . . . to get ice in winter time and to make ice cream in summer time."

The impossibility, in the future, of aiding the insufficiency of his dam by means of the canal, as the plaintiff had been doing for years before, and the impurity of the water backed into his pond from the canal were circumstances tending to lessen the market value of the plaintiff's property; and the court erred in not admitting the evidence.

It is clear that a railroad company must be permitted in a proceeding of this sort, commenced by an alleged landowner, to dispute his title to the property for which damages are claimed. If this were not so, the company might be obliged to pay damages for the same land a number of times.

The duties of the viewers under the act of 1849 are: "To estimate and determine whether any and if any what amount of damages have been or may be sustained and to whom payable." If they err in either of these findings, the railroad company may appeal. The proceeding is then *de novo,* and the question of title arises upon the trial of course. Church v. Northern C. R. Co. 45 Pa. 339.

The time for raising a question of title is upon the trial as in other cases, unless, as in McCurdy v. Chestnut Hill R. Co. 8 W. N. C. 143, there are several claimants to the same property and the company desires all the claimants to be bound by the one proceeding.

H. C. G. Reber and *Geo. F. Baer,* for defendant in error.—The company was estopped by its proceedings, and by the form of the issue, from disputing the claimant's title. Church v. Northern C. R. Co. 45 Pa. 340; McCurdy v. Chestnut Hill R. Co. 8 W. N. C. 144; Peoria & R. I. R. Co. v. Bryant, 57 Ill. 473; Selma, R. & D. R. Co. v. Camp, 45 Ga. 180; Missouri River, Ft. S. & G. R. Co. v. Owen, 8 Kan. 409; Peoria, P. & J. R. Co. v. Laurie, 63 Ill. 264; Rippe v. Chicago D. & M. R. Co. 23 Minn. 18; Knauft v. St. Paul, S. & T. F. R. Co. 22 Minn. 173.

Assuming, however, that the question of title could be raised, the plaintiff in error made no offer which tended to disprove Keller's title.

The property had been used as an ice dam for nearly forty years. From 1848 to the time of the appropriation by the railroad company, the ice cut from the dam was sold in the city of Reading.

The addition of the words "make ice cream in summer time" is to be construed as an additional grant, and not as restricting the operation of the first.

The offers to show that the water of the Union canal was polluted and unhealthy; that the general appearance of the canal indicated neglect, and the necessary and speedy abandonment of

the same, which would deprive Keller of the backwater and the ability to cut ice upon it; and that since the appropriation the stock holders of the canal company had resolved to abandon it,—were irrelevant and inadmissible.

OPINION BY MR. JUSTICE STERRETT:

The grant from Shaneman to Huber and Weis was correctly construed by the court below, and hence there is no error in the rulings complained of in the first four specifications.

Evidence tending to show the polluted condition of the water in the canal, as affecting the market value of the property in question at the time it was appropriated by the railroad company, should have been received and submitted to the jury. The evidence proposed may have been entitled to very little weight, but still it was proper for their consideration. The fifth to twelfth specifications, inclusive, together with the twentieth, are therefore sustained.

As the basis of his claim for damages it was, of course, incumbent on plaintiff below to show title to the property claimed by him and appropriated by the railroad company, and its fair market value at the time it was taken. On the other hand the company had a right to rebut by proving, if it could, that part of the premises in question did not belong to plaintiff and that his claim was excessive. There is nothing in the form of the issue or the pleadings to preclude defense on either of these grounds. The offers of evidence bearing on these points, and referred to in the fourteenth to nineteenth specifications inclusive, should have been received and submitted to the jury with proper instructions as to its effect.

The remaining specifications are not sustained. The property appropriated by the railroad company was an ice plant, operated as such by plaintiff below. Its value depended on its location, facilities for conducting the business, proximity to market, etc. Facts tending to enlighten the jury on these subjects, and thus enable them to reach a correct conclusion as to its value, were therefore admissible. The principles of law applicable to claims such as this have been so often stated that it is unnecessary to repeat them.

Judgment reversed and a *venire facias de novo* awarded.

William Hawk, Plff. in Err., v. Pennsylvania Railroad Company.

A freight brakeman on a train drawn by two engines takes the risk of the increased strain put upon the couplings, and cannot recover for injuries resulting from the parting of the train.

The fact that on other divisions of the same road where the grades are not so steep a pushing engine and stronger couplings are used is, in an action against the railroad company for injuries resulting from the parting of the train, irrelevant.

Where the proximate cause of the parting of a train is the breaking of the couplings, and the application of all the brakes but two, which are out of order, fails to stop the detached section, *non sequitur* that if the two brakes had been in good order the section would have stopped, or that the failure of the railroad company to have the brakes in good order renders it liable for injuries resulting from the collision of the detached section with the rest of the train.

Testimony as to the reckless character of an engineer is inadmissible, unless accompanied by proof that his character was known or might with reasonable care have been known to the railroad company, or that he was negligent on the occasion in question.

(Argued May 26, 1887. Decided October 3, 1887.)

January Term, 1887, No. 322, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Mifflin County to review a judgment of compulsory nonsuit in an action of trespass on the case. Affirmed.

At the trial before BOUCHER, P. J., the following facts appeared:

William Hawk, the plaintiff below and in error, was on October 19, 1882, a freight brakeman in the defendant's employ on the Sunbury & Lewistown Division. He had been a freight brakeman for about fourteen months and during that time had

NOTE.—For the standard of safety of appliances required, see note to Drew v. Gaylord Coal Co. 2 Sad. Rep. 340. For the responsibility for acts of fellow servants, see note to Keys v. Pennsylvania Co. 1 Sad. Rep. 316.

For authorities bearing on the duty of master with respect to the employment of competent servants, see editorial note to Smith v. St. Louis & S. F. R. Co. 48 L. R. A. 368. See also editorial note to Kingston v. Ft. Wayne & E. R. Co. 40 L. R. A. 146, presenting the authorities as to his liability for employing a drunkard.

also served on the Huntingdon & Broadtop Railroad and on the Mountain Division of the defendant's main line. On October 19, after dark, the train of thirty-five cars on which he was employed was, with two engines pulling it, beginning to descend a long and steep grade, when it broke into three or four pieces. He was left alone on the third or fourth piece which consisted of several cars. After notifying the engineers of the break, by means of his lantern, he went over all the cars twice and applied all the brakes but two, which would not work. The brakes did not stop the cars and at the bottom of the grade there was a collision with the fore part of the train, and the plaintiff was so injured that his leg had to be amputated. He brought this action to recover damages for the injury.

The plaintiff offered to prove that the grades on this division were heavier than on the main line, and that therefore stronger couplings were necessary, but that in fact no stronger couplings were used. Objection sustained. (First and second assignments of error.)

The plaintiff then offered to prove that on the main line the defendant employed an engine to push behind, for the purpose of reducing the strain on the couplings on grades, to be followed by proof that the grades on this division were steeper than on the main line. Objection sustained. (Third and fourth assignment of error.)

The plaintiff also offered to prove that Edward Walter, one of the engineers of the train on which the plaintiff was injured, was reckless and careless and so known among railroad men—this for the purpose of establishing his character as an unfit person to be employed, and his general reputation as such that the defendant could have known his character by inquiry. Objection, on the ground that notice had not been brought home to the defendant and that there was no evidence of the engineer's negligence in this case, sustained. (Fifth assignment of error.)

The court entered a compulsory nonsuit, and upon refusing to take it off (sixth assignment of error), delivered the following opinion:

In this case the plaintiff, an employee of the defendant company, was injured by the parting of a train on the Lewistown & Sunbury division of the defendant's road on the 19th of October, 1882. The accident happened on a considerable grade, de-

scending from north of Lewistown past the poor house to the long trestle work near the Lewistown station. It occurred between 6 and 7 o'clock in the evening. Plaintiff alleges that, although a brakeman on the train, the company is liable:

First, because the train was double headed, *i. e.*, had two engines at the head of the train, instead of one at each end thereof, one pulling and one pushing; that by putting both at the head, and thus throwing the whole strain on the couplings, the defendant was guilty of negligence. It is a complete answer to this to say that it has been repeatedly held that the master may conduct his business in his own way; that the plaintiff took service with a company which resorted to this method of double heading. He should have declined entering upon or abandoned the service after entering upon the same, when he discovered the company's method of propelling trains in this way by means of double heading. All evidence as to the methods of the defendant company in using two engines in drawing the same train on other roads of the same company were, for the reasons given, if none other, properly rejected. Naylor v. Chicago & N. W. R. Co. 53 Wis. 661, 11 N. W. 24; Ladd v. New Bedford R. Co. 119 Mass. 412, 20 Am. Rep. 331; Clark v. St. Paul & S. C. R. Co. 28 Minn. 128, 9 N. W. 581; Fleming v. St. Paul & D. R. Co. 27 Minn. 111, 6 N. W. 448; Gibson v. Erie R. Co. 63 N. Y. 449, 20 Am. Rep. 552; Dillon v. Union P. R. Co. 3 Dill. 320, Fed. Cas. No. 3,916; Illinois C. R. Co. v. Welch, 52 Ill. 183, 4 Am. Rep. 593; Devitt v. Pacific R. Co. 50 Mo. 302; Kelley v. Chicago, M. & St. P. R. Co. 53 Wis. 74, 9 N. W. 816; Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467.

Second, plaintiff alleges negligence on the part of defendant because out of many brakes he discovered two not in working condition, the one with what he supposes was a chain too long and the other with a dog or ratchet which failed to act. The plaintiff offered no evidence to show that it was known to the company that these two brakes were out of order, nor when they became so. For aught that appears, their condition may have been the result of the trip then making; and besides the company could not be charged with negligence as between it and its employees, upon the proof that two brakes out of thirty would not act. No such doctrine has been announced by any case within our knowledge; and it should not be, as it would hold

companies to a rule of responsibility which would be unreasonable and impossible of compliance. Who could say, when the brakes of five cars which did act failed to arrest the section on the down grade, that the two which did not act would, if added, have done so. This would be the merest guess as to their effect. It could not with certainty be said that these two nonacting brakes were the proximate cause of the accident, or even contributed thereto. The proximate cause was the breaking of the couplings, and whether the nonacting brakes would have prevented the collision if they had acted cannot possibly be known. There is but little authority on the duty of railway companies to have effective brakes, the cases generally arising out of isolated cars with defective brakes, as in North Pennsylvania R. Co. v. Kirk, 90 Pa. 15, where a lumber car was left standing on a siding leading into plaintiff's warehouse, and was left standing there beyond the time required for its removal by the rules of the company. It had a defective brake and was not blocked; so that when a number of cars from a freight train were started from main track on to the siding they struck this lumber car and forced it into the warehouse, by demolishing warehouse doors, and killed plaintiff's son, who was inside the warehouse. There was evidence that the nearest (front) car running into the siding had a defective brake.

The question of negligence (I take it, as to the effective blocking of the car on the siding, and its being left there against the rules of the company) went to the jury, as also the question as to the brake on the front car of the section colliding. But it will be observed that leaving a single car on a siding with a defective brake and unblocked, and permitting a section of a train to run on the siding with a bad brake on the front car,—and as I understand it there was negligence in reference to the switch itself,—is a very different question than the one in hand, where in a train of some thirty to thirty-five cars two brakes, when applied, were ineffective, without proof that the company knew, and without evidence to show, that the running of the train had not damaged the brakes in the very trip then making. Thus, there was nothing to submit to the jury in the matter of the brakes. Then as to the couplings giving way; the principle that the master may conduct his business to suit his own views applies to couplings just as to double heading the trains. Couplings give way from causes impossible of detection in advance

of the occurrence, such as flaws, bad welds, etc. The offer to show that on the main line the company used different couplings was rightly rejected; because if admitted, then if a similar accident happened on the main line, it would be competent for plaintiff to show the different couplings used on the Sunbury & Lewistown Road, and thus each could be used to condemn the other. There was no evidence whatever to show that the broken coupling was defective, unless, indeed, it is to be inferred and assumed that it was so from the mere fact that it broke. This of itself would not constitute negligence and make the defendant liable to an employee who followed his business from fifteen to seventeen months and was familiar with the coupling used on the particular train.

As to the offer to show Engineer Walters reckless by reputation, in the absence of any proof of improper or reckless conduct in the particular case and accident; it is sufficient to refer to what the court has said when rejecting the several offers of plaintiff.

We decline, therefore, to take off the nonsuit.

Porter & McKee, for plaintiff in error.—It is the duty of the master to select competent servants and to provide safe implements and machinery for the use of his servants. The risk of service that the servant takes supposes that the master has secured proper servants and machinery for the conduct of the work. The duty to use reasonable care in performing those acts always remains the duty of the master. Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467; Booth v. Boston & A. R. Co. 73 N. Y. 38, 29 Am. Rep. 97; Blake v. Maine C. R. Co. 70 Me. 60, 35 Am. Rep. 297; Ardesco Oil Co. v. Gilson, 63 Pa. 146; Mullan v. Philadelphia & S. Mail S. S. Co. 78 Pa. 25, 21 Am. Rep. 2; Wood, Master & S. 376.

The increased burden required of the couplings, links and pins on this train should have been provided for by the company. The grades on this road are more than ordinarily heavy; the train was more than an ordinary train, requiring two engines to haul it, and required more than ordinary couplings, links, and pins under the circumstances.

For not furnishing them the defendant was guilty of negligence. Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 462, 3 N. E. 344.

The custom of the company in supplying a pusher when heavy

trains are being hauled on heavy grades, to relieve the strain on the couplings, links, and pins, should have been admitted in evidence to show that the defendant did recognize the fact that on heavy grades the ordinary couplings, links, and pins are insufficient; and the duty of the company was to supply sufficient appliances for the purpose under similar circumstances on this road, and it was guilty of negligence in not doing so. Green & C. Street Pass. R. Co. v. Bresmer, 97 Pa. 103.

The defects in the brakes were not patent defects that the plaintiff could have seen at a glance, but were nevertheless such as the yard inspector could know by a personal inspection. No inspection was made. For this reason the case should have gone to the jury on the question of negligence in making up the train. Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 462, 3 N. E. 344; Rummell v. Dilworth, P. & Co. 111 Pa. 343, 2 Atl. 355, 363; Noyes v. Smith, 28 Vt. 59, 65 Am. Dec. 222; Jones v. New York C. & H. R. R. Co. 92 N. Y. 628.

Plaintiff assumed only patent risks naturally and reasonably incident to his employment. Philadelphia, W. & B. R. Co. v. Keenan, 103 Po. 124.

George W. Elder and *Rufus C. Elder,* for defendant in error.—If a person in the employment of a railroad company discovers that the appliances with which he is working are or have become, through use, unsafe, and continues without any special order of the company, and without making any complaint, to use the said appliances, he will be held to have either run the risk of being injured or to have been guilty of contributory negligence; and hence in case of injury to him occasioned by such defect the company will not be liable. And this is true even though the defect be such a one as under ordinary circumstances the company would be bound to repair. Ballou v. Chicago, M. & St. P. R. Co. 54 Wis. 257, 41 Am. Rep. 31, 11 N. W. 559; Brossman v. Lehigh Valley R. Co. 113 Pa. 490, 57 Am. Rep. 479, 6 Atl. 226; Wharton, Neg. § 214; Philadelphia & R. R. Co. v. Schertle, 97 Pa. 450.

Negligence is to be found upon evidence and is not to be presumed from the bare fact of the occurrence of the accident. Gramlich v. Wurst, 86 Pa. 78, 27 Am. Rep. 684; Philadelphia & R. R. Co. v. Boyer, 97 Pa. 91.

Presumption is against the company in case of a passenger,

and against the employee if he is hired by the company and is in the course of his regular employment and engagment at the time. Weger v. Pennsylvania R. Co. 55 Pa. 461.

An employer is not bound to furnish for his workmen the safest machinery, nor to provide the best methods for its operation, in order to save himself from responsibility for accidents resulting from its use. If the machinery be of an ordinary character and such as can, with reasonable care, be used without danger to the employee, it is all that can be required from the employer; this is the limit of his responsibility and the sum total of his duty. Payne v. Reese, 100 Pa. 306; Pittsburgh & C. R. Co. v. Sentmeyer, 92 Pa. 280, 37 Am. Rep. 684; Shaffer v. Haish, 110 Pa. 575, 1 Atl. 575.

It is not negligence in the master if the tool or machine breaks, whether from an internal original fault, not apparent when the tool or machine was at first provided, or from an external apparent one produced by time and use, not brought to the master's knowledge. These are the ordinary risks of the employment, which the servant takes upon himself. Baker v. Allegheny Valley R. Co. 95 Pa. 215, 40 Am. Rep. 634; Ryan v. Cumberland Valley R. Co. 23 Pa. 384.

Now, if these couplings were defective, then it was either from an internal original fault, not apparent when the links or pins were provided, or from an external apparent one, produced by time and not brought to the notice of the company; and in either case defendant is not responsible. The two defective brakes were not the proximate cause of this accident.

The duty of inspection owed by defendant to plaintiff was fulfilled by the employment of competent and careful inspectors. Little Miami R. Co. v. Fitzpatrick, 42 Ohio St. 318; Mackin v. Boston & A. R. 135 Mass. 201, 46 Am. Rep. 456; Wonder v. Baltimore & O. R. Co. 32 Md. 418, 3 Am. Rep. 143; Mansfield Coal & Coke Co. v. McEnery, 91 Pa. 191, 36 Am. Rep. 662.

Two brakes defective out of seventy on this train, one of them with a defective dog or ratchet (which may have become so on this trip), does not warrant the conclusion that the train was not inspected, as plaintiff's counsel insist. In addition plaintiff knew, or should have known, that it was the duty of his conductor to inspect the brakes and couplings, and therefore negligence for these defects, if any there were, in the couplings, was

to be attributed either to the car inspectors or the conductor; and in either event these men were fellow employees, for whose negligent acts defendant was not responsible. Such is the law as to a conductor and laborer on gravel train. Ryan v. Cumberland Valley R. Co. 23 Pa. 384 (brakeman and car repairer); Campbell v. Pennsylvania R. Co. 1 Sad. Rep. 299 (employee in the shop and brakemen); New York, L. E. & W. R. Co. v. Bell, 112 Pa. 403, 4 Atl. 50.

In Gottlieb v. New York, L. E. & W. R. Co. 100 N. Y. 462, 3 N. E. 344, the employer held responsible for the result of the inspection as well as the employment of competent inspectors.

We know of no Pennsylvania cases holding that doctrine.

The plaintiff's handling of these brakes was so hastily and imperfectly done that it was of no effect. One half of these brakes properly applied would have brought these cars to a standstill.

Again; just before the collision occurred plaintiff passed to the front end of the section, to the very point where the danger was most imminent and injury to himself inevitable; therefore, he cannot recover damages for the injury sustained. Lehigh Valley R. Co. v. Greiner, 113 Pa. 600, 6 Atl. 246; Brossman v. Lehigh Valley R. Co. 113 Pa. 491, 57 Am. Rep. 479, 6 Atl. 226.

The court below, under all the circumstances, decided that there was no negligence proven on the part of Walters. Unless some act of his contributed to the accident it mattered not what his habits were. Huntingdon & B. T. Mountain R. & Coal Co. v. Decker, 82 Pa. 124.

Character for care, skill, etc., although growing out of the special acts of a party, cannot be established by proof of such acts, but by evidence of general reputation. Frazier v. Pennsylvania R. Co. 38 Pa. 104, 80 Am. Dec. 467.

Where there is no evidence of the knowledge of the company of the want of capacity in a fellow servant, in an action against the company it is error to submit the question of knowledge to the jury. Keystone Bridge Co. v. Newberry, 96 Pa. 246.

If plaintiff's case fails to show the omission of any duty incumbent on defendant, a nonsuit will be entered. Jennings v. Pennsylvania R. Co. 93 Pa. 337; Baker v. Fehr, 97 Pa. 70; Philadelphia & R. R. Co. v. Schertle, 97 Pa. 450.

A mere scintilla of evidence of a material fact does not justify

a judge in leaving it to the jury. Reinhart v. South Easton, 2 Sad. Rep. 90; Philadelphia & R. R. Co. v. Yerger, 73 Pa. 121.

PER CURIAM:

After a careful examination of this case, we have failed to discover any evidence tending to show such negligence on part of the defendant or its employees as would render it liable for the plaintiff's injuries; we must, therefore, concur with the court below in its rulings.

The judgment is affirmed.

Appeal of H. S. Thompson et al.

Estate of Richard Silverthorne, Deceased.

A bequest to A., of all the balance of testator's estate, real and personal, whatsoever, "for which bequest I order that he, the said A., pay all my just debts, funeral expenses," etc., creates a charge for the payment of testator's debts upon the land in the hands of A.

Such a devise is an estate upon condition of paying the debts; and the title of the devisee does not become absolute until the performance of the condition.

In order to continue the lien of debts upon the estate, under such a de-

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Cited in Woonsocket Inst. for Sav. v. Ballou, 16 R. I. 351, 1 L. R. A. 555, 16 Atl. 144, holding that the debts of decedent were made a direct charge upon devised real estate by the terms of the devise.

NOTE.—The debts of a decedent, not of record, were a lien upon his real estate for a period of five years from the time of death. By the act of February 24, 1834, the land was released, if an action be not instituted within that period. Ferguson v. Yard, 164 Pa. 586, 30 Atl. 517; Hunt's Appeal, 105 Pa. 128; Oliver's Appeal, 101 Pa. 299. This limit of time for instituting the action was reduced to two years by the act of June 8, 1893, P. L. 392, and must be duly prosecuted to judgment. When debts are thus barred, the fact that they are charged upon the land does not change the rule, as held in THOMPSON'S APPEAL (Mitchell's Estate, 182 Pa. 530, 38 Atl. 489; Miller's Appeal, 60 Pa. 404), unless an active trust for their payment is created by the will (Seitzinger's Estate, 170 Pa. 531, 32 Atl. 1101); or unless there is a conversion of the realty into personalty under the will (McWilliam's Appeal, 117 Pa. 111, 11 Atl. 383).

vise in the will, the creditors must proceed to sue and obtain judgment before the debt is barred by the act of February 24, 1834, limiting the lien to five years.

(Argued May 25, 1887. Decided October 3, 1887.)

July Term, 1887, Nos. 47, 48, E. D., before MERCUR, Ch. J. GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Appeal from a decree of the Orphans' Court of Huntingdon County on exceptions to the report of an auditor in the matter of the distribution of the assets of the estate of Richard Silverthorne, deceased. Affirmed.

The following facts were found by the auditor, Jere B. Rex, Esq.:

The fund for distribution is made up of a balance of the personal assets of the decedent and the purchase money of a portion of the decedent's real estate sold by order of court to Charles L. Hockenberry. Upon this fund three classes of creditors are claimants, the lien creditors of the decedent, the general creditors or those whose claims are not liens upon his real estate, and the lien creditors of Charles Silverthorne, devisee under the will of his father.

Richard Silverthorne, the testator, died on the 5th day of April, 1879, after having made his last will and testament, dated the 10th day of April, 1876, to which he added a codicil dated the 18th day of October, 1877. He appointed as his executors Robert McNeal, J. C. Crawford, and his son Charles Silverthorne. The first-named executor, after letters testamentary had been granted, was discharged upon his petition presented to your honorable court. For several years Charles Silverthorne alone conducted the settling up of the estate, but subsequently J. C. Crawford took an active part also. Two accounts were filed on the 2d day of February, 1886; one, as the "First account of Charles Silverthorne, acting executor of the last will and testament of Richard Silverthorne, etc.," and the other, as the "Account of J. C. Crawford and Chas. Silverthorne, executors of Richard Silverthorne, etc.," They were both presented for confirmation nisi on the 14th day of April, 1886, and no exceptions being filed they were confirmed absolutely on the 20th day of April, 1886. The account of Charles Silverthorne, "acting executor, etc.," shows no funds in his

hands; the account of "J. C. Crawford and Charles Silverthorne, executors, etc.," exhibits the cash balance now in their hands for distribution, and the unpaid purchase moneys of the real estate sold to Chas. L. Hockenberry, which they also desire distributed to creditors.

The first provision of Richard Silverthorne's will is: "I will that all my just debts and funeral expenses be paid by my son Charles as shall be hereafter set forth."

After certain bequests of personal property to the widow, and a life interest in certain real estate possessed by the testator at the time of his death, and other devises of real estate to his sons John and William, the will contains the following devise to Charles Silverthorne: "And to my son Charles I give and bequeath all the balance of my estate real and personal, with all accounts and moneys due, life insurance policy, and all manner and kinds of property whatsoever, for which bequest I order that he, the said Charles, pay all my just debts, funeral expenses and the charges of settling up my estate." By the codicil to the will, the interest in the real estate bequeathed to his son John is directed to go to Charles Silverthorne in the event of his (John's) death before the death of the testator. John died before his father and his interest vested in his brother Charles.

On the 16th day of September, 1885, J. C. Crawford and Charles Silverthorne presented their petition to your honorable court setting forth that the balance of the personal fund of Richard Silverthorne's estate remaining in their hands was insufficient to pay the debts yet owing by the estate, and praying an order for the sale of a portion of the real estate devised to Charles Silverthorne for the payments of the debts of the decedent. An order of sale was granted, and the real estate set forth in the petition was sold to Charles L. Hockenberry for $2,900, which sale was duly confirmed on the 14th day of December, 1885. Of this sum $975 have been paid to the executors, $975 will be due on the 14th day of December, 1886, and $975 on the 14th day of December, 1887. The fund for distribution is consequently made up in part of cash from the sale of personal property, cash from the sale of real estate, and in part of the unpaid purchase money of real estate.

The auditor decided that the debts of the decedent were not made a charge by the will upon the estate devised to his son, Charles Silverthorne, and made distribution accordingly.

The general creditors filed objections to this ruling.

After hearing the argument upon exceptions to the auditor's report, the court, FURST, P. J., filed the following opinion:

The vital question in this case is: Were the debts of the decedent made a charge by his will upon the estate devised to his son, Charles Silverthorne? This question was decided by the auditor in the negative.

The testator in the first clause of his will declares: "I will that all my just debts and funeral expenses be paid by my son Charles as shall be after set forth." He then bequeaths to his widow certain "household and kitchen furniture"—and also several pieces of land. To his sons John and William he devises a saw mill, with certain timber, and also a tract of land, directing them to pay an annuity of $25 annually to their mother, etc. Then follows this devise: "And to my son Charles I give and bequeath all the balance of my estate, real and personal, with all accounts and moneys due, life insurance policy, and all manner and kind of property whatsoever, for which bequest I order that he, the said Charles, pay all my just debts, funeral expenses, and the charges of settling up my estate. . . . And further should the life policy herein mentioned for any cause not be made available, then I order that the tract of flint land, and the mountain tract in connection with it be sold, and the proceeds applied to the payment of the debts." In a subsequent clause he appointed Charles one of his executors.

The policy of insurance was paid to Charles, and therefore the clause directing the sale of the tract of land above referred to became inoperative.

It will thus appear that the question involved arises upon the true construction of the residuary clause in the will. In his will he first directs the payment of his debts, by his son Charles, who is the residuary legatee, devisee and one of the executors. After making certain specific bequests and devises, the testator blends his real and personal estate, into one common fund, in a residuary devise to his son Charles, for which bequest he orders and directs him to pay his debts, funeral expenses, etc.

Does this create a charge upon the estate devised to Charles? That it created a personal charge, upon the acceptance of the devise by Charles, is of course admitted, but it is denied by the individual creditors of Charles that it created any charge upon

the land sold by the executors of Richard Silverthorne, for the payment of debts. The lands sold are those included in this residuary devise. The contest is between the general creditors of Richard Silverthorne and the judgment creditors of Charles.

To determine the question involved we must ascertain the intention of the testator. It is his intent as expressed in the will, either by express words, or necessary implication, which must govern and control our judgment.

It has been held, by our supreme court, in many adjudged cases, that in order to charge lands devised with the payment of a legacy or debts it must appear by direct expression or plain implication, that such was the intention of the testator to be gathered or inferred from the whole will. We will only refer to Brandt's Appeal, 8 Watts, 198; Mellon's Appeal, 46 Pa. 165; Okeson's Appeal, 59 Pa. 99; English v. Harvey, 2 Rawle, 305; and Montgomery v. M'Elroy, 3 Watts & S. 371, 38 Am. Dec. 771.

The residuary devise in this case, after first directing the payment of testator's debts, contains these important words, for this bequest, etc., he is to pay all my debts. It will be noticed that this is not separate and distinct from the devise, but it is part and parcel of the same sentence. In other words it is the consideration for the devise. It has the same signification, as if the testator said: In consideration that Charles pay my debts, I devise to him the residue of my estate, real and personal. It thus becomes the condition upon which he holds the bequest and devise. It is an estate upon condition. The title of the devise becomes absolute upon the performance of the condition, and not until then. It is a charge upon the title which is sufficient notice to all the world.

As in articles of agreement for the sale of land, the purchase money which is the consideration for the conveyance is a lien upon the title until paid. The vendee can only compel conveyance of the full legal title, upon discharging the purchase money.

The principle is the same where the title is conveyed by will, subject to like condition. The donee cannot hold the benefit and refuse to comply with the condition upon which the devise was made. The land only belongs to the donee when he performs the conditions of the devise.

In Hoover v. Hoover, 5 Pa. 351, it is held that both the estate and the person of the devisee of land charged with legacies,

become liable therefor by an acceptance of the devise. In the opinion of the court, p. 355, Mr. Justice BELL says he who accepts a benefit under a will must conform to all its provisions and renounce every right inconsistent with them.

On the same page he refers to the opinion of Mr. Justice KENNEDY in Lobach's Case, 6 Watts, 167, and quotes Justice KENNEDY as saying: "The testator not only intended to charge the land but to make it a personal charge on the devisee; and he became personally liable, on taking possession under the will. These distinct liabilities are illustrated by the consideration that the estate given to David may be treated as an estate on condition. In a will no precise form of words is necessary to create a condition."

Any expressions, denoting such an intention, will have that effect. Thus a devise to A, he paying or me to pay $500, in one year after my decease, would, it is said, be in a condition for the breach of which the heir might enter. 2 Powell, Devises, 251; Barnardiston v. Fane, 2 Vern. 366.

In Nichols v. Postlethwaite, 2 Dall. 131, 1 L. ed. 319, John Davis, the testator, bequeathed several pecuniary legacies. Then he devised as follows: All the rest and residue of his estate, real and personal, he gave to his son, whom he appoints executor, and who after testator's death entered into possession. Testator had no personal estate. It was held by the court that nothing was given to the residuary devisee but what remained after payment of the legacies. These are a charge upon the testator's real estate.

In the case before us, we have first the mingling of the realty and personalty in a gift of the residue of the testator's estate. After he has directed the payment of his debts we have further the express declaration of the testator, that for this bequest the debts are to be paid by the residuary devisee, clearly showing that the intent of the testator was to give all the residue of the estate to Charles upon condition that he would pay his debts. In this devise there was also embraced a policy of insurance upon the life of the testator. In order that his son Charles might have an ample fund out of which to pay the debts, the testator provided that if Charles failed to receive the money due under the policy, certain real estate was devised to him, which he was to sell, to raise a fund with which to pay his debts. Under this devise if the debts are not expressly charged, can there

be any doubt, that they are charged by implication? That the testator devised this fund to Charles, for this express purpose, and that he should hold the same upon that condition?

Taking the entire devise into consideration, as well as all the other parts of the will, relating to his debts, we have no difficulty in coming to the conclusion that Richard Silverthorne intended to make his debts a charge upon the residuary estate devised to his son Charles.

Under a residuary clause, less forcible and clear, Chief Justice SHIPPEN held that a charge on the land was thereby created. Tucker v. Hassenclever, 3 Yeates, 294.

This case is so strong upon this principle that we might here stop. We will cite but a few other cases which affirm the same doctrine. Bank v. Donaldson, 7 Watts & S. 407; Mellon's Appeal, 46 Pa. 165.

Mr. Justice STRONG, p. 175, delivering the opinion of the court says: "Certainly a mingling of the real and personal estate in a gift of the residue of a testator's property does with us imply an intent to charge the land, either by itself or in aid of the personalty, with the payment of general pecuniary legacies. Such an implication is necessary to enable the whole will to take effect and all the legacies to be paid." The rule obtains as well in the payment of debts, for the same reason that the personal fund is the one designated by law for the payment of debts.

In *Re* Tower, 9 Watts & S. 103, 42 Am. Dec. 319, the language of the devise was: "To my nephew, Jeremiah Tower, I give and bequeath all my estate, real and personal, he paying the legacies hereinafter stated." GIBSON, Ch. J., held the legacies a charge upon the land. See also Gilbert's Appeal, 85 Pa. 347, and McFait's Appeal, 8 Pa. 290.

Where a testator by his will blends his real and personal estate, he thereby charges his lands with the payment of legacies. M'Lanahan v. Wyant, 1 Penr. & W. 96, 21 Am. Dec. 363.

The case of Trinity Church v. Watson, 50 Pa. 518, and Walter's Appeal, 95 Pa. 305, are not in conflict with the cases referred to.

In Trinity Church v. Watson, it was held that a general charge on real estate by devise for the payment of debts does not create a testamentary lien of unlimited duration, subject only to the presumption of payment by lapse of time.

In order to continue the lien of debts upon the estate, under such a general devise in the will, the creditors must proceed to sue and obtain judgment before the debt is barred by the statute of 1834 limiting their lien to five years.

Walter's Appeal, 95 Pa. 305, only decides that a bare direction by a testator to devisees to pay money is nothing more than a personal obligation of the devisees. A charge upon the land is not thereby created. Where debts are made a charge upon the real estate by the will of the testator, a trust is created for the benefit of his creditors; and there is no limitation to the lien of such debts as regards such real estate, except only the limitation which may arise from presumption of payment by lapse of time. Steel v. Henry, 9 Watts, 523.

We are therefore led by the authorities cited, and the principles enunciated by text writers upon this branch of the law, to hold that the debts of Richard Silverthorne were, under the residuary clause of his will, charged upon the estate therein devised to his son Charles; and hence they must first be paid, before any part of the fund in court can be distributed to the creditors of Charles. This determination of the question renders unnecessary the consideration of the other exceptions.

It may be proper, however, to state that the auditor erred in the method of distribution of the fund arising from the personal estate. This fund must be distributed *pro rata* among all the creditors of Richard Silverthorne—the real-estate fund to the liens according to their priority. The order of payment and distribution laid down in Hoover v. Hoover, 5 Pa. 356, should be observed. If any other method of distribution of the personal fund will reach the same result, with less complication, it can be adopted; if not, the rule indicated must be followed.

The question involved in the exception, that the auditor erred in holding that a judgment obtained against Richard Silverthorne in his lifetime, but which had not been revived since his death, within the proper time, lost its lien, and must be postponed to judgment creditors of Charles, is now immaterial, and unnecessary to decide. It is only important as between judgment creditors of Richard in his lifetime, and in that case priority of lien must be observed. The case referred to by the auditor, Jack v. Jones, 5 Whart. 321, was decided under the act of 1798, and not under the act of February 24, 1834, which

has made material changes in the law. As we do not decide the question, we will not discuss it.

The report of the auditor is reversed, and the same is referred back to him to make distribution according to the principles herein stated.

The account was restated in accordance with this ruling and a decree entered accordingly, from which H. S. Thompson and J. M. Blair, lien creditors of Charles Silverthorne, took this appeal, assigning as error the action of the court in the construction of the will and in sustaining the exceptions to the report of the auditor.

W. H. & J. S. Woods, for appellants.—To make debts a direct charge upon the land of the decedent the language of the will must be not only positive, but precise and clear. Debts are never a charge by implication; legacies may be. Agnew v. Fetterman, 4 Pa. 62, 45 Am. Dec. 671; Hepburn v. Snyder, 3 Pa. St. 78.

A bare direction by a testator to devisees to pay money is nothing more than a personal obligation of the devisees. Walter's Appeal, 95 Pa. 305; Cable's Appeal, 91 Pa. 327.

A direction to pay debts, coupled with a power to sell for that purpose, does not prevent the running of the statute of limitations. Agnew v. Fetterman, 4 Pa. 56, 61, 45 Am. Dec. 671; Trinity Church v. Watson, 50 Pa. 518.

If the debts were not a direct charge upon the land, the court below was clearly in error.

But if the testator by his will made his debts a direct charge upon the land devised to his son Charles, would that prevent the running of the statute of limitations and the act of 1834 against these claims, no suit for the recovery of the same having been brought within the statutory period?

By the act of 1834 no debts of a decedent, except those secured by mortgages or judgments, shall remain a lien on his real estate longer than five years after his death, unless an action for their recovery be commenced and duly prosecuted within that period. This act did not create a lien; it was an act limiting the duration of the lien of debts, which before the act of 1794 were indefinite. It was an act of repose, and its purpose was intended "to prevent the mischief which springs from liens of

unlimited duration." We infused into the act of 1797 for limiting the lien of decedent's debts, principles borrowed from the act of 1798 for limiting the lien of judgments. Fetterman v. Murphy, 4 Watts, 429, 28 Am. Dec. 729.

In Kauffelt v. Bower, 7 Serg. & R. 64, GIBSON, J. said: "The legislature has uniformly discouraged every other lien or encumbrance than those which arise from transactions which appear of record, and which therefore can prejudice no one who uses proper diligence to ascertain the state of the facts; and even when liens are permitted, it has been thought that the state of property, as well as the habits of the people, required them to be laid under severe limitations and restrictions."

"Great injustice as well as inconvenience must ever result from secret liens being permitted to continue without limitation under any circumstances whatever. . . . If seven years is not to be a bar to a proceeding against the lands of deceased debtors to obtain payment of the debts, where nothing was done within that period to continue the lien as required by the act, when will it be prudent to trust the heir or devisee, on account of his being the owner and possessor of lands by inheritance or last will?" Kerper v. Hoch, 1 Watts, 13. See also Maus v. Hummel, 11 Pa. 228.

The learned judge below relied upon Steel v. Henry, 9 Watts, 523, to sustain his position.

The facts in that case are entirely different from the facts in this. Henry brought his action against the executors of James Steel within one year after testator's death and obtained judgment. His debts then became a debt of record.

In Trinity Church v. Watson, 50 Pa. 518, Watson & Patterson had a debt against the testator but no suit had been brought to recover it within the period of five years after the death of the testator. The single question before the court was: Had this claim of Watson & Patterson lost its lien upon the New Castle lot? The court below, relying on the authority of Alexander v. M'Murry, 8 Watts, 504, and Steel v. Henry, decided that it had not.

In Sample v. Barr, 25 Pa. 459, a case where the devise was of that part of testator's land which should remain after payment of his debts, it was held that the debt must be established and in the mode pointed out by the act of 1834, and that if the creditor means to enforce his lien, if he intends to charge the

real estate, he shall bring in the widow and heirs and for what? Not to contest his lien, but his debt; and if he does not do so, he has no right to pursue the decedent's real estate, "but to assume the existence of the debt, which the statute says shall be proved, and then to argue that the will devised only what remained after payment of debts is to sacrifice the statute to a *petitio principii.*"

If Charles Silverthorne had sold the real estate devised to him by his father, it cannot be questioned, under the act of 1834, that the judgments of Jones & Burdge and of James Coulter would not have continued a lien on said real estate in the hands of the purchaser, unless they had been revived by scire facias. If that is so, do they not lose their lien as against the judgment creditors of Charles? Are not the judgment creditors of the heir or devisee entitled to the same protection under the act as is a purchaser?

In Bank of North America v. Fitzsimons, 3 Binn. 361, speaking of a purchaser and a judgment creditor this court says: "Is not the one as much a purchaser as the other?"

In Fryhoffer v. Busby, 17 Serg. & R. 121, it was held that the lien of a judgment not revived expires on the termination of the five years established by the limitation act of 1798, as against another judgment creditor, notwithstanding the death of the debtor before the end of the five years. See also Jack v. Jones, 5 Whart. 321.

This case is also referred to and approved in Konigmaker v. Brown, 14 Pa. 273.

A. J. Patterson, J. M. Bailey, W. M. Williamson, and *D. Caldwell,* for appellees.—If Richard Silverthorne could charge his real estate with the payment of his debts he did so.

In Newman v. Johnson, 1 Vern. 45, where the testator said: "My debts and legacies being first deducted, I devise all my estate, both real and personal, to J. S.," it was held to charge the real estate.

In Bowdler v. Smith, Prec. in Ch. 264, where a testator devised "as to my temporal estate wherewith God hath blessed me I give and dispose thereof as followeth: First, I will that all my debts be justly paid which I shall at my death owe, . . . also I devise all my estate in G. to A.," and this was all the real

estate testator had, it was held that the will charged it with the debts.

In Trott v. Vernon, 2 Vern. 708: *"Imprimis,* I will and devise that all my debts, legacies, and funeral expenses shall be paid and satisfied in the first place."

In Harris v. Ingledew, 3 P. Wms. 91: "As to my worldly estate, my debts being first satisfied, I devise the same as follows." In these cases it was held that the debts were charged upon the real estate.

Where the executor is devisee of real estate, a direction even to him to pay debts will charge the real estate. 3 Jarman, Wills, p. 416.

A devise to A of all testator's real and personal property, "he paying debts and legacies," makes them a charge. West Branch Bank v. Donaldson, 7 Watts & S. 407; *Re* Tower, 9 Watts & S. 103; Baylor v. DeJarnette, 13 Gratt. 152; Little v. Hager, 67 N. C. 135.

A devise to A, "he paying" testator's debts out of the estate given to him, creates a charge. Gardner v. Gardner, 3 Mason, 178, Fed. Cas. No. 5,227.

A devise "in consideration of the devise to A, I order him to pay my debts," etc., creates a charge. Hoover v. Hoover, 5 Pa. 351. See also Sands v. Champlin, 1 Story, 376, Fed. Cas. No. 12,303.

Where the whole estate is given to W, "who in consideration thereof" is to pay, etc., a charge is created. Hill v. Huston, 15 Gratt. 350.

So, too, where the estate is given "upon condition of payment," etc. Bugbee v. Sargent, 23 Me. 269.

Courts of equity have always been desirous of sustaining charges by implication for payment of debts and the presumption in favor of them is not to be repelled by anything short of clear and manifest evidence (from the will) of a contrary intention. It has therefore been established, as a general rule, that a direction by a testator that his debts shall be paid charges them by implication on his real estate either as against his heir at law or devisee. Downman v. Rust, 6 Rand. (Va.) 587.

PER CURIAM:

The very able opinion of the learned judge of the court below

so fully disposes of this case as to render a further discussion of it unnecessary.

The appeals are dismissed and the decree affirmed, at the costs of the appellants.

John H. Stiffler, Plff. in Err., *v.* Charles Retzlaff.

A purchaser of property at an assignee's sale cannot be affected by a private agreement between two of his predecessors in the title, which was not recorded and of which he had no notice.

The admissions of the purchaser, as to what he supposed he was to get by his purchase, amount to nothing; his rights are defined by the deed, and these can neither be enlarged nor abridged by his declarations.

(Argued May 27, 1887. Decided October 3, 1887.)

July Term, 1887, No. 2, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Blair County to review judgment on a verdict for the plaintiff in an action of ejectment. Affirmed.

The facts as they appeared on the trial, before DEAN, P. J., were stated in the charge, substantially as follows:

The issue you are sworn to try is an ejectment brought by Charles Retzlaff, the plaintiff, to recover possession of a portion of a half lot of ground. The title to the whole lot became vested in John H. Stiffler, by deed from Patrick Doran. In this deed the lot is described as fronting 42 feet on Eighth avenue and running back 120 feet to an alley.

Presumptively, from this description, the lot also fronted 42 feet on the alley, but it is admitted that an accurate survey shows that it extends only 35 feet along the alley; it is 7 feet narrower at that end than on Eighth avenue. John H. Stiffler, the purchaser, on April 16, 1881, went into possession of the whole lot, and made improvements, put up a store room fronting on Eighth avenue, and also a wareroom and stable on the rear end of the lot, and was occupying and using the whole lot; but the store room did not extend over more than the half of the front on Eighth avenue.

John H. Stiffler conveyed the eastern half of the lot to his son Joseph K. Stiffler, described as a lot fronting 21 feet more or less

on Eighth avenue and running back 120 feet to an alley, being the one half of the same lot conveyed to John H. Stiffler by Patrick Doran and wife. Joseph K. Stiffler made an assignment for the benefit of his creditors to I. B. Hughs. The property was sold to Charles Retzlaff, this plaintiff.

By the written and recorded deed of John H. Stiffler to his son, Joseph K. Stiffler, Joseph K. Stiffler's deed to his assignee, I. B. Hughs, and I. B. Hughs's deed to the plaintiff, the plaintiff is entitled to the half of the lot by a line running from a point 21 feet from either corner on Eighth avenue to a point 17½ feet from the corner at the alley. If John H. Stiffler, the defendant, is in possession of any portion of the land east of that line, by the deeds his possession is wrongful, and the plaintiff is entitled to a verdict for that much land. It is not disputed in the evidence here by John H. Stiffler, the defendant, that his ware room and store room extend over that line eastward, and that he is in possession of more than half of the lot. But the defendant claims that he is there by right, and not wrongfully; and that makes the issue in this case. John H. Stiffler, the defendant, alleges that by an agreement made by him and his son on July 18, 1884, two days after the date of the deed, the description in the deed is so modified or restricted as to include less of the lot than it otherwise would. The following is the agreement:

Altoona, July 18, 1884.

Article of agreement, made this day between John J. Stiffler of the first part and J. K. Stiffler of the second part, Witnesseth, and they covenant and agree that the lot or parcel of land deeded to the party of the second part on July 16, 1884, shall only extend along the alley 9 feet and that the plank building thereon erected shall remain the property of the party of the first part until such time as this article of agreement shall be made void. And further we agree that the stairway between the buildings shall be used in common till such time as there may be other arrangements made.

In witness whereof we have set our hands and seals the year and day above mentioned.

Witness— John H. Stiffler, [Seal.]
Charles F. Rees. J. K. Stiffler, [Seal.]

By this agreement instead of Joseph K. Stiffler getting half of the lot, he gets 8½ feet less than half the lot on the alley; and

instead of the exclusive use of the 21 feet on Eighth avenue, the use of so much as is covered by the hall stairway is to be thereafter in common for the use of the two owners of the property. It is not alleged that this agreement was put on record; it was kept in the possession of the defendants, but the deed was on record.

We instruct you:

First, if the purchaser had notice of this agreement before he purchased, his rights are limited by it just the same as the rights of Joseph K. Stiffler, a party to it, would be limited by it, were he a contestant here as against his father, John H. Stiffler;

Second, if the purchaser, otherwise than from the agreement itself, had notice of John H. Stiffler's claim, he is affected by it the same as if he were a party to it.

Verdict and judgment for plaintiff.

The defendant submitted, *inter alia,* the following points:

4. That if at the time of the purchase by Retzlaff any notice was given at the sale before the property was offered of an article of agreement between John H. Stiffler and Joseph K. Stiffler when Retzlaff was present, then, even if the agreement was not read, it was such notice as should have put him on inquiry, and it was his duty to inquire as to what the agreement did contain; and if he failed to do this, he would be bound by the terms of the agreement whatever they were.

Ans. This point is denied. (First assignment of error.)

8. That if to run the line as claimed by the plaintiff would be to permanently injure and almost ruin the building occupied as a store room and dwelling house as is claimed by the defendant, and that would be apparent to any one inspecting the property, then the strong presumption would be that such was not the intention of John H. Stiffler when he conveyed the title to Joseph K. Stiffler, and if that fact would be apparent Retzlaff would be presumed to know such was not his intention.

Ans. This point is denied. (Second assignment of error.)

5. That if after John H. Stiffler made the deed to Joseph K. Stiffler, he and his tenants occupied, from that time down to and including the day of the sale, all of the store room, dwelling house and ware room on the lot as claimed by him, including that portion which Retzlaff now claims as a part of his lot, it was the duty of Retzlaff to make inquiry of John H. Stiffler or his

tenant in possession as to the extent of his claim, and if he neglected to do this he is affected with a knowledge of the title of John H. Stiffler.

Ans. The point is affirmed, unless you should find from the evidence that John H. Stiffler voluntarily made an announcement at the sale which would now estop him from claiming in opposition to his deed. The constructive notice here mentioned would not be conclusive against the purchaser if John H. Stiffler misled him. (Third assignment of error.)

9. That Retzlaff's admission in his testimony that at the time of the purchase he did not suppose he was getting any portion of the John H. Stiffler building, occupied by a store room and dwelling house, nor the warehouse, in connection with the testimony of H. H. Herr, Esq., counsel for the assignee, and also of John H. and Joseph K. Stiffler, and the evidence as to the occupancy of the buildings by John H. Stiffler and his tenant, and the permanent injury which would result to the buildings, shows clearly that at the time of the sale it was not supposed or claimed by any of the parties that the deed from John H. Stiffler included any portion of the lot covered by the building used as a store and dwelling, nor the warehouse, and the plaintiff cannot recover any portion of the lot covered by these buildings.

Ans. This point is denied. (Fourth assignment of error.)

10. There is no such evidence here as would warrant the jury in finding that the conduct of John H. Stiffler was such as would operate as an estoppel, and the verdict must be for the defendant.

Ans. This point is denied. (Fifth assignment of error.)

The plaintiff submitted, *inter alia,* the following points:

That if when John H. Stiffler, by his counsel, undertook to give notice to bidders at the sale of the secret claim upon the property, and that if that notice was confined to his rights in the stairway and in no way to the dimensions to the lot, he is estopped from enlarging and from making any claim other than for the use of the stair way.

Ans. This point is affirmed, that is, if you find that his silence was reasonably calculated to mislead the purchaser, and that he was actually misled by it. (Sixth assignment of error.)

The court excluded the testimony which the defendant offered to prove by John H. Stiffler: "That it was distinctly agreed between him and Joseph K. Stiffler at the time the deed was made

that there was to be no conveyance of any part of the lot covered by his store room or ware room; to be followed by proof by Joseph K. Stiffler, the other party to the deed, that such was the understanding at the time and that the deed was a mistake so far as any other description was concerned." (Seventh assignment of error.)

H. M. Baldridge, for plaintiff in error.—The defendant below asked the court to say that even if the article was not read as claimed by plaintiff, yet if notice was given of the existence of an agreement at the time the property was offered, when Retzlaff was present, it was then his duty to inquire as to its contents; and if he neglected to do this then he would be bound by the agreement. This point the court denied and in this we think there was error. Notice may be by record, by possession, or it may be given directly by writing or verbally. Banks v. Ammon, 27 Pa. 175.

It is established law in Pennsylvania that whatever puts a party upon inquiry amounts to notice, provided the inquiry becomes a duty, as it always is with a purchaser, and would lead to the discovery of the requisite facts by the exercise of ordinary diligence and understanding. Hottenstein v. Lerch, 104 Pa. 454; Hill v. Epley, 31 Pa. 336; Jaques v. Weeks, 7 Watts, 267; Lodge v. Simonton, 2 Penr. & W. 448, 23 Am. Dec. 36.

When an easement is apparent and continuous the purchaser takes subject to it although it is not mentioned in the deed. Why? Because if he had notice of such facts as should have put him upon inquiry, then he had constructive notice of it, which the law regards as equivalent to actual notice. The defendant claimed that even if there were no actual notice given, these facts were certainly sufficient to bring notice to Retzlaff. Overdeer v. Updegraff, 69 Pa. 110; Hottenstein v. Lerch, 104 Pa. 454.

In order to make out an estoppel it must not only appear that the representation was made with a knowledge of the facts, but the party to whom it was made must have been ignorant of the truth of the matter, and also destitute of all convenient or ready means of acquiring such knowledge by the use of ordinary diligence. Woods v. Wilson, 37 Pa. 379, 384.

A party is not estopped by his acts or declarations from showing the truth, unless such acts or declarations were intended to influence the conduct of another, or he had reason to believe that

they would have that effect. Kuhl v. Jersey City, 23 N. J. Eq. 84.

The element of fraud is essential either in the intention of the party estopped or in the effect of the evidence which he attempts to set up. Hill v. Epley, 31 Pa. 334.

A party cannot rely upon an estoppel from acts and representations upon which he was not induced to act otherwise than he would. Helser v. McGrath, 52 Pa. 531.

He must have been misled or deceived by them. Simpson v. Pearson, 31 Ind. 1, 99 Am. Dec. 577; Connihan v. Thompson, 111 Mass. 270.

And this must affirmatively appear. Diller v. Brubaker, 52 Pa. 498, 91 Am. Dec. 177.

Three ingredients are necessary to constitute equitable estoppel *in pais:* (1) Misrepresentation, or wilful silence; (2) that the actor, having no means of information, was by the conduct of the other induced to do what otherwise he would not have done; and (3) that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively. Com. v. Moltz, 10 Pa. 531, 532, 51 Am. Dec. 499.

While it is true that as a general rule parol testimony cannot contradict or alter the language in a deed, yet it is admitted in cases of fraud or mistake. A boundary line agreed to by the parties may be shown by parol, notwithstanding language of the deed. Hagey v. Detweiler, 35 Pa. 409; Gertzer v. Kammerer, 36 Phila. Leg. Int. 392; Seiber v. Oles, 110 Pa. 301, 1 Atl. 252.

Aug. S. Landis and *Alexander & Herr,* for defendant in error.—If a man is silent when he should speak, he will not be heard when he would speak. Bigelow, Estoppel, 501.

Stiffler having undertaken to give notice, and having withheld notice of what he now claims, he is estopped, and cannot claim any equitable principle in his favor. Com. v. Moltz, 10 Pa. 530, 51 Am. Dec. 499; Hill v. Epley, 31 Pa. 333; Miranville v. Silverthorn, 48 Pa. 149.

Nor does it make any difference that the purchaser might have discovered that he would acquire no title by his purchase had he made diligent inquiry. He has been put off his guard and induced to make no inquiry by the words of encouragement he has received. Maple v. Kussart, 53 Pa. 352, 91 Am. Dec. 214.

It is further urged that the doctrine of estoppel is not applicable in this case because it is argued: (1) That there must be misrepresentation or silence; (2) that the party affected must be ignorant of the truth of the matter, and be induced to act; (3) that injury must ensue by Stiffler's now speaking the truth.

For Stiffler to withhold notice of his claims would be a fraudulent concealment of the truth.

His silence was at least a "deceptive silence," and is "incompatible" with innocence of intention. Bigelow, Estoppel, 608.

Even without fraudulent intent a party may so speak and act as to silence his future assertion of the truth, to the prejudice of him whom he has innocently misled. Miranville v. Silverthorn, 48 Pa. 149; Power v. Thorp, 92 Pa. 351.

OPINION BY MR. CHIEF JUSTICE GORDON:

We have examined with care the statement and argument of the learned counsel for the plaintiff in error, who was the defendant below, as well as the other parts of this case.

The deed of John H. Stiffler to his son, Joseph K., is certainly without ambiguity; it conveys the one half of the Doran lot. This was, no doubt, a mistake, and was corrected as between the parties themselves, by the agreement of the 18th of July. But while the deed was duly recorded, the agreement was not; and it is hardly necessary for us to say that the purchaser at the assignee's sale could not be affected by a private arrangement of which he had no notice. Hence, the principal question of the case was one of notice, and that not merely of the fact of a collateral agreement, but of its contents; and as this question was fully and fairly submitted to the jury, the plaintiff in error has really nothing of which to complain.

It is urged that as the defendant's buildings were over the line called for by the deed, that fact should have put the plaintiff on inquiry. But how could this be in the face of his, the defendant's, own deed? There was no question but that he could thus have sold; neither is there any doubt but that, by his deed, he did thus sell. The record negatived an adverse holding; and beyond this the plaintiff was not bound to inquire.

Outside the agreement, to which reference has been made, the defendant had no case; hence, the third, fifth, and sixth assignments cover rulings of the court below which were more favorable to the defendant than he could lawfully have required.

Retzlaff's admissions as to what he supposed he was to get by his purchase amount to nothing, for prima facie he got just what was described in Joseph K. Stiffler's deed, and his rights could neither be enlarged nor abridged by his declarations.

The agreement alone changed the prima facie character of the deed; and as of the contents of this the jury found the plaintiff had no notice, he was clearly not bound by it.

What we have said disposes of all the assignments except the sixth, and that is so clearly without merit that we pass it without comment.

The judgment is affirmed.

Daniel K. Reamey, Plff. in Err., *v.* William C. Bayley, Trustee for Mary E. Reamey.

An agreement between a husband and a third person, as trustee for the wife, that, in consideration of the discontinuance of a suit by the wife for divorce on the ground of intolerable treatment, the husband will execute a bond and mortgage to the trustee to secure the payment of $10,000 (instead of $4,000 by antenuptial settlement) in case, by the husband's treatment, the wife's condition should become intolerable, is a valid contract and not contrary to public policy.

After the discontinuance of the suit, the execution of the bond and mortgage, the return of the wife to cohabitation with the husband, and his subsequent breach of the condition, the trustee may maintain an action against him on the bond.

A provision making the wife the sole judge as to what shall constitute a breach of the condition is void because contrary to public policy.

(Argued May 26, 1887. Decided October 3, 1887.)

Cited in Barbour v. Barbour, 49 N. J. Eq. 429, 24 Atl. 227, compelling performance of contract whereby husband agreed to convey real estate to wife in settlement of divorce suit.

NOTE.—The facts of this case are analogous to those of Fisher v. Filbert, 6 Pa. 61, in which a like determination was made.

Postnuptial contracts may be enforced. Zeok v. Mercantile Trust Co. 194 Pa. 388, 45 Atl. 215. And the settlement of family differences will furnish a sufficient consideration. Burkholder's Appeal, 105 Pa. 31. So contracts for immediate separation will be enforced. Frank's Estate, 195 Pa. 26, 45 Atl. 489; Biery v. Steckel, 194 Pa. 445, 45 Atl. 376; Speidel's Appeal, 107 Pa. 18.

As to validity of contract between husband and wife to compromise pending or contemplated divorce suit, see the full presentation of the authorities in editorial note to Oppenheimer v. Collins, 60 L. R. A. 406.

January Term, 1887, No. 85, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Blair County to review a judgment on a verdict for the plaintiff in an action of debt. Affirmed.

The facts as they appeared at the trial before DEAN, P. J., were stated in his charge to the jury, which was as follows:

The issue you are sworn to try is an action of debt brought by William C. Bayley, trustee for Mary E. Reamey, against Daniel K. Reamey. The action is founded on a written instrument which it is necessary to read that you may start with a proper understanding of the case. It appears from the papers offered in evidence that on the 15th day of November, 1877, an antenuptial agreement was made between Daniel K. Reamey, the defendant in this case, and Mary E. Gardner, to whom he was about to be married, which reads as follows:

"Agreement made the 15th day of November, A. D. 1877, between Daniel K. Reamey, of Hollidaysburg, county of Blair and state of Pennsylvania, of the one part, and Mary E. Gardner, widow of Jacob Gardner, deceased, of the city of Harrisburg and state aforesaid, of the other part.

"Whereas, a marriage is intended shortly to be solemnized between the said Daniel K. Reamey and Mary E. Gardner, and upon the faith of said marriage it has been mutually agreed as follows: the said Daniel K. Reamey hereby covenants and agrees with said Mary E. Gardner that she shall receive out of the said Daniel K. Reamey's estate the sum of $4,000, to be paid with interest from the time of his decease, as soon as convenient without sacrificing any portion of his estate. And the said Mary E. Gardner, in consideration of said covenant and agreement, covenants and agrees with the said Daniel K. Reamey to accept the said sum of $4,000 payable as aforesaid; and in further consideration of the contemplated marriage and the fact that she has an estate in her own right and no one dependent upon her for support, she, the said Mary E. Gardner, hath released and forever quitclaimed to him the said Daniel K. Reamey, his heirs, executors, administrators, and assigns, all her right, interest, and claim of dower, distributive share or otherwise in the real and personal estate of the said Daniel K. Reamey. It is further covenanted and agreed that if the said Daniel K. Reamey should devise and bequeath by will to the said Mary E.

Gardner an amount not less in value than $4,000, then this agreement shall be void and of no effect. The said Mary E. Gardner further covenants and agrees that if hereafter she shall controvert or dispute or call in question the validity of this agreement, or shall prosecute any action or suit for dower or any other part of the real and personal estate of the said Daniel K. Reamey, she shall thereby forfeit all claim to any portion of said estate."

This is the antenuptial agreement entered into in view of marriage. They were married some time afterwards. Some time after the marriage, troubles arose between Reamey and his wife, and Mrs. Reamey commenced proceedings in divorce, which proceedings were pending at the time this bond, on which suit is brought, was executed. The bond is as follows:

Know all men by these presents, that I, Daniel K. Reamey, am held and firmly bound unto William C. Bayley, trustee for Mary E. Reamey, in the sum of $20,000, to be paid to the said William C. Bayley, trustee as aforesaid, his certain attorney, heirs, executors, administrators, or assigns, to which payment well and truly to be made I do bind myself and my heirs firmly by these presents. Witness my hand and seal the 26th day of November, in the year of our Lord, 1881.

The condition of this obligation is such that if the above bounden Daniel K. Reamey, his executors, administrators, and assigns, do well and truly pay or cause to be paid unto the said trustee of Mary E. Reamey, his certain attorney, heirs, executors, administrators, and assigns, the sum of $10,000, one day after the date hereof, according to the provisions of a certain agreement made by and between the said Daniel K. Reamey and the said trustee, bearing even date herewith, without any fraud or further delay, then this obligation to be void; otherwise to be and remain in full force and virtue.

[Signed.] Daniel K. Reamey.

Now follows the agreement bearing date with the bond, in the sum of $20,000 conditioned for the payment of $10,000:

Memorandum of an agreement made this 26th of November, 1881, by and between Daniel K. Reamey of Hollidaysburg, Pa., of the first part and William C. Bayley, trustee for Mary Reamey, wife of Daniel K. Reamey.

Whereas, Prior to the marriage of said Daniel K. Reamey and Mary Reamey an agreement was made between them, dated the 15th of November, 1877, acknowledged by Daniel K. Reamey before Samuel W. Collum on the same day and acknowledged by Mary E. Gardner, the said Mary E. Reamey, on the 16th of November, 1877, by which said agreement the said Daniel K. Reamey settled upon the said Mary the sum of $4,000 to be paid to her out of his estate in lieu of dower in case she would survive him; and whereas, since the marriage, unhappy disputes have arisen between the said husband and wife, resulting in a separation and a suit for divorce by the said wife against the said husband, now pending in the court of common pleas of Blair county; and whereas, the said parties desire to live together in harmony, it is hereby agreed as follows:

"First, the said Mary E. Reamey agrees to withdraw the said suit for divorce, at the cost of the said Daniel K. Reamey.

"Second, the antenuptial agreement mentioned in the foregoing recital shall be modified by making the words 'four thousand dollars,' wherever therein mentioned, to read 'ten thousand dollars,' the said alteration being made with the full knowledge of the entire estate of said Daniel K. Reamey on the part of said Mary.

"Third, the said Daniel K. Reamey shall herewith execute a bond and first mortgage to said trustee on his farm on the Juniata river for the purpose of securing to the said Mary the payment of the said $10,000 at his death, in the event of her surviving him, and also for the purpose set forth in article four.

"Fourth, the said Daniel K. Reamey and Mary E. Reamey shall behave towards each other kindly and faithfully; and if the said Daniel K. Reamey shall behave himself otherwise towards his said wife so that her life, by his conduct, shall be rendered miserable and intolerable, then and in that contingency the said bond and mortgage shall become immediately due and payable to the said trustee for the absolute use of the said Mary. And the said Mary shall alone and exclusively determine the existence or happening of such contingency; and the said bond and mortgage shall bear interest from the happening of said contingency.

"Fifth, the original antenuptial agreement signed by said Daniel K. Reamey is annexed to this agreement for the use of said trustee, and a duplicate of said antenuptial agreement,

signed by Mary E. Gardner, now Mary E. Reamey, is annexed to a duplicate of this agreement for the use of the said Daniel K. Reamey, and they are the papers referred to in the recital as the antenuptial agreement.

"Sixth, it is understood that if the bond and mortgage for $10,000 should be collected from Daniel K. Reamey under the provisions of the fourth article, that the said Mary shall not be entitled to any share of the estate of Daniel K. Reamey in case of her surviving him, and it is further understood that the remaining provisions of said antenuptial agreement are not to be affected by this agreement beyond this change in the sum of money as above set forth.

"In testimony whereof the said parties have hereto set their hands and seals, and the said Mary E. Reamey, for the purpose of showing her consent thereto, has set her hand and seal."

This was a postnuptial settlement to take effect on the happening of either of the two contingencies: First, in case she survived him, this being a contingency, of course, beyond the control of either, she might or might not enjoy the settlement under the stipulation. If she should die first, neither she nor her heirs would receive anything. If she should survive him, she would receive $10,000. Second, in case he should behave himself otherwise than kindly and faithfully towards her, so that her life should be rendered miserable and intolerable, then the bond was to become immediately due and payable.

The happening of this contingency depended on the voluntary act of the husband. The contract of settlement in this particular, it will be noticed, does not make separation the contingency, but good behavior on the part of the husband. Separation may result from unkind treatment; but the contract, so far as expressed, does not suggest separation. We cannot say it is necessarily implied. Therefore, as we construe it, the second contingency upon which she comes into the enjoyment of the amount settled upon her is whether or not the husband, by unkindness or unfaithfulness, renders her life miserable and intolerable. It is strongly urged by the defendant's counsel that such a stipulation is void because against the policy of the law. It is argued that the policy of the law is to encourage and promote harmony in the marriage relation; that this

contract invites violation of marital duties by a direct appeal to mercenary motives; that it provides for a bribe of $10,000 for the promotion of domestic discord.

As we have already said, we cannot say, on a fair construction of this contract, that the contingency on which the $10,000 becomes due and payable is separation. On the other hand we say to you, it means just what it says: that she was to come into the immediate enjoyment of the amount settled upon her if he did not behave kindly and faithfully towards her, and her life was rendered miserable and intolerable. Whether this contingency happened is a question to be determined by you from the weight of the evidence.

The plaintiff alleges that the right to sue on the contract is to be determined by her; so, at this place, we answer the plaintiff's points:

First, by the contract in evidence the bond in suit became due and payable with interest if the conduct of the defendant to his wife should become intolerable; and of this fact Mrs. Reamey was made the exclusive judge, and her determination of the fact by her written memorandum on the 22d of June, 1885, is conclusive.

We answer this point as follows: The fourth clause of the contract stipulates that the wife "shall alone and exclusively determine the existence or happening of such contingency." By the marriage contract, as well as by this contract, they were bound to behave towards each other "kindly and faithfully." If he violated the marriage contract, then, by this contract, she was to come into the immediate enjoyment of this $10,000. It was her interest, then, to decide or determine that he had not adhered to his marriage vows. It is needless to argue that such an interest would have a tendency to impel her to a reckless or unjust decision. The conclusion is obvious that it was her interest to decide in such way that the harmony of the conjugal relation would be disturbed. This power was reposed in one of the contracting parties to that relation. We hold that it is clearly against the policy of the law to give effect to such stipulation in this postnuptial contract. It tends directly to discourage that confidence, trust and forbearance on the part of the wife which should be inseparable from the marriage relation. Whether her husband did behave himself towards her kindly

and faithfully, or otherwise so that her life by his conduct was rendered miserable and intolerable, is a question to be determined by you on the weight of the evidence and not by her decision. Her declarations adverse to the husband have no bearing on the question at issue.

True, the authorities show that parties to contracts may leave the decision of disputes to the agent of one of the parties, or even to one of the parties, and both are bound by the decision; but the marriage contract is of an entirely different nature from other civil contracts. Its existence is during the life of the parties to it. It is the policy of the law to discourage any subsequent contracts between the parties which tend to bring about a rupture of the first contract. Whether the contingency would happen would depend on his conduct. Whether it had actually happened could not, with due regard to the safety of the marriage contract, depend upon the judgment of one of the parties to the marriage contract. This stipulation that she should alone and exclusively determine whether the contingency had happened is void.

Our answer to the second point is the same as our answer to the first. The third point is denied.

The defendant argues forcibly that by the same course of reasoning the entire contract must be held void as against public policy; but we hold, as held the supreme court of the state in the case of Fisher v. Filbert, 6 Pa. 61, that the settlement of a sum of money to the separate use of the wife, her enjoyment of it to be contingent on the good behavior of the husband, is not void as against the policy of the law. [While that case stands as the law, this contract must be treated as a valid one. You will, therefore, turn your attention to the evidence bearing on this issue.]

(The court then reviewed the testimony and continued:)

So far as the use plaintiff and this defendant are concerned, this case is to be judged and judged alone by their conduct between the 21st of November, 1881, and the 22d of June, 1885. You have nothing to do with either of them outside of that period. So far as appears from the evidence, Mrs. Reamey was a chaste, reputable woman at that date; and you have a right to so assume. So far as appears the husband was, at that time, a sober, industrious man, who by industry and thrift had become possessed of a considerable estate. That is how they start before

you on the 21st of November, 1881. How did they behave afterwards, each towards the other?—is the proper subject of inquiry under the evidence. Does the weight of the evidence satisfy you that he during that period behaved towards his wife unkindly, so as to render her life miserable and intolerable? If so, your verdict should be for the plaintiff for the sum of $10,000, with interest from the 22d of June, 1885. If on the other hand the weight of the evidence fails to satisfy you of this, then your verdict should be for the defendant.

The defendant has submitted points as follows:

1. The agreement of the 26th of November, 1881, upon which the bond in suit is founded, is a postnuptial contract and is void. If the agreement is void, there can be no recovery on the bond.

Ans. This point is denied.

2. The fourth article of the agreement having stipulated that the bond was only to be due and payable on the contingency of the defendant not treating his wife kindly and faithfully, such maltreatment was not a sufficient consideration for the bond's falling due in the defendant's lifetime; and no action can now be sustained on the bond.

Ans. This point is denied.

3. The stipulation in the fourth article, that defendant's maltreatment of his wife should render the bond due and payable in his lifetime, is against public policy and void, and no action can now be sustained on the bond.

Ans. This point is denied on the authority of the case we have mentioned. Fisher v. Filbert, 6 Pa. 61.

4. A postnuptial contract, as in this case, stipulating for the payment to the wife of her dower in defendant's estate in his lifetime, upon a rupture of friendly relations, is void and cannot be enforced in an action of law.

Ans. This point is denied.

5. From the fact that the husband and wife agreed upon a trustee to whom the bond was to be due and payable, it is not of greater binding effect, as the parties being in coverture cannot enlarge their power to contract with each other in regard to the wife's share in her husband's estate.

Ans. This point is denied.

6. The *cestui que* plaintiff and the defendant being man and wife could not, through the intervention of a trustee, enter into

an executory contract for the payment of money to the wife which was not her own estate or property.

Ans. This point is denied.

7. It is for the court to construe the meaning of the fourth article of the agreement; and if it was a provision for the payment of money to the wife for her maintenance upon the contingency of a future separation it is void, and there can be no recovery on it.

Ans. This point is affirmed, but we do not construe the fourth article as a provision for maintenance upon the contingency of a future separation. On the contrary, it is upon a contingency which is to be found by you from the evidence in the case, as we have already instructed you.

8. No suit can be entertained by the wife against the husband, except for the causes and in the manner provided in the act of the 11th of April, 1856, and the act of the 15th of April, 1851, providing for the entering of judgments against the husband for her money. This suit is not brought to recover her "property" in the sense meant by the act of 1856 and therefore this suit cannot be sustained.

Ans. This point is denied.

9. The parties to this suit, Mrs. Mary Reamey and Daniel K. Reamey, being in coverture on the 26th of November, 1881, could not at that time evade the provisions of the act of the 11th of April, 1856, so as to appoint a trustee and agree that a suit should be brought against the defendant upon the happening of a future contingency in his lifetime to recover the amount which it was at the same time agreed was to be her share in his estate at his death; and therefore this suit cannot be sustained.

Ans. This point is denied.

The assignments of error specified (1–9) the answers to the defendant's respective points, and (10) the portion of the charge inclosed in brackets and the action of the court "in submitting the case to the jury, and in not saying to the jury that the postnuptial contract was void, that the action would not lie, and that plaintiff could not recover."

Aug. S. Landis and *W. I. Woodcock,* for plaintiff in error. —The first seven assignments of error—the court's denial of defendant's first seven points—raises the question of the validity of the postnuptial contract of November 26, 1881.

The postnuptial contract was void, and the bond based upon it was likewise void and of no effect. It is a new ascertainment of her share as widow in his estate, and it is a contract between a man and his wife that her share in his estate shall on a contingency be payable in his lifetime, and collected by process of law. This, under any aspect of it, is clearly without consideration, is executory, and against the policy of the law, and void. Steer v. Steer, 14 Serg. & R. 379.

Except when authorized by act of assembly, husband and wife have no power to enter into executory contracts through the intervention of a trustee.

All contracts looking to a separation in the future, or dependent upon some contingency, are void, are against the policy of the law and will not be enforced. McKennan v. Phillips, 6 Whart. 576, 37 Am. Dec. 438; Hutton v. Hutton, 3 Pa. St. 100; Dillinger's Appeal, 35 Pa. 362; Hitner's Appeal, 54 Pa. 114; Tyler, Infancy & Coverture, 329; 1 Smith, Lead. Cas. 620; Addison, Contr. 1384.

A wife, by her next friend, or trustee, cannot sustain any action at law against her husband, except it be in pursuance of the act of April 11, 1856, § 3.

When a husband has deserted or refused to support his wife, or if she has been divorced from bed and board, she may have three kinds of actions or suits against him: First, to protect her reputation by action of slander; second, to recover her separate property; third, to recover her earnings.

It is not pretended here that the right to recover rested upon any of these conditions. She sued upon a bond given in pursuance of a void postnuptial contract, and becoming due not as a bona fide debt, but on the happening of a contingency which made it void and illegal. Ritter v. Ritter, 31 Pa. 396; Miller v. Miller, 44 Pa. 170.

Samuel S. Blair, for defendant in error.—The consideration of the bond in suit is not only legally valid, as imported by the seal, but it is shown by the evidence to be meritorious.

The defendant had succeeded by the compromise in obtaining a condonation of his brutal treatment of his wife and escaping her just claim for alimony. It was not necessary to show that she was justified in leaving him and that she had good grounds for divorce. The burden was on the defendant to show that she left without cause. Burkholder's Appeal, 105 Pa. 38.

A covenant to put an end to a suit for nullity of marriage on the ground of husband's impotence is a good consideration for the payment of an annuity to the wife. Wilson v. Wilson, 14 Sim. 405, 1 H. L. Cas. 538.

A husband and wife are competent to make a binding agreement for compromise of a divorce suit. Hart v. Hart, L. R. 18 Ch. Div. 670.

When a divorce suit is compromised by articles for a separation, the contract will be enforced. Smythe v. Smythe, L. R. 18 Q. B. Div. 544.

There is no occasion for the discussion of separation contracts here. The object of the contract was reunion, not separation. The husband had been faithless to his marital vows. His wife had been driven from home by his barbarity, and forced to seek protection in court; and the bond only furnished an additional motive for fidelity. The contract was not against but in the line of public policy, which encourages matrimonial harmony. It is not open to the objection urged that it looks to a separation. Separation is the voluntary act of the parties, but a voluntary separation would have created no liability under this contract. The liability arises from the husband's own acts and if separation thereby results it is forced and involuntary. This view is fully sustained by Fisher v. Filbert, 6 Pa. 61.

Per Curiam:

An examination of this case fails to reveal to us any error committed by the court below. The charge and answers to the points appear to be accurate, legal and fair, and the argument of the learned counsel for the plaintiff in error has failed to convince us of the rectitude of all or any of the assignments of error.

The judgment is affirmed.

Levi Delosier et al., Plffs. in Err., *v.* Pennsylvania Canal Company.

The boundaries of a tract of land taken by right of eminent domain for a reservoir are, without a deed, sufficiently defined by running a line at a

Note.—For proof of boundaries of land taken by the state for canal purposes, see Pennsylvania Canal Co. v. Dunkel, 101 Pa. 103; Pennsylvania Canal Co. v. Harris, 101 Pa. 80; Smucker v. Pennsylvania R. Co. 188 Pa.

stated level, mapping the tract included, cutting down the timber thereon, compensating the owner for the number of acres included, and then flooding the same, to sustain ejectment for the tract by the commonwealth's grantee.

Land taken for the reservoirs of the Pennsylvania canal, under the statutes regulating its construction, although not entirely covered except during floods, was held by the commonwealth in fee, and passed in fee to the purchaser upon the sale of the canal in 1857.

(Argued May 24, 1887. Decided October 3, 1887.)

July Term, 1886, No. 115, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Blair County to review a judgment for the plaintiff on a point reserved in an action of ejectment. Affirmed.

The facts as they appeared at the trial in the court below before DEAN, P. J., were stated in his charge to the jury which was as follows:

This is an action of ejectment brought by the Pennsylvania Canal Company against Levi Delosier and others for a tract of land in Blair township, containing about 129 acres. In 1839 the commonwealth commenced the construction of the eastern reservoir, an improvement designed to store water for the use of the Pennsylvania canal. The bed of the reservoir was located on the southwest branch of the Juniata river, about 1½ miles south of the main line of the canal, with which it was connected by a feeder. The whole area of the reservoir is about 539 acres, 300 acres of which, the portion immediately at and adjoining the breast, was purchased by the commonwealth from Judge Joseph McCune. The remaining portion immediately adjoining the McCune tract belonged, at the time of the construction of the reservoir, to Dr. Shoenberger, John L. Ingram, Patrick McCloskey and, perhaps, to other owners. That which belonged

40, 41 Atl. 457. When the state acquired land for canal purposes it secured a fee, which passed to its grantee, and not a mere easement. Wyoming Coal & Transp. Co. v. Price, 81 Pa. 156; Haldeman v. Pennsylvania C. R. Co. 50 Pa. 425; Craig v. Allegheny, 53 Pa. 477. Though no damages were ever assessed and paid, the owner not having applied to have his damages assessed within one year as required by the act of April 9, 1827. Robinson v. West Pennsylvania R. Co. 72 Pa. 316. See also Farnham, Waters, p. 452, as to nature of estate or interest acquired in land taken for canal purposes.

to Dr. Shoenberger, to the extent of 129 acres, is the portion in dispute.

The defendants on the evidence here have whatever title or right to the possession remained in Shoenberger, or those claiming under him, after the abandonment of the reservoir; and the plaintiff has whatever right or title the commonwealth had or acquired from Shoenberger at the time of the construction of the reservoir.

It is admitted on both sides that the reservoir was abandoned and the water drawn off in 1881 or 1882. The issue turns, it seems to us, upon a question of law which is entirely for the court. At the time of the original laying out of the reservoir, as shown by the map of Morris, chief engineer, filed in the auditor general's office in 1839, the land intended by the commonwealth to be embraced within the area of the reservoir included this land in dispute.

Thomas T. Wierman, in charge of the construction of the work, ran the line of the land intended to be embraced within the boundaries in 1846 or 1847. This line, he testifies, was run so as to include all land which might be covered by water at the height of four feet above the overflow or waste way at the breast of the dam, and included so much of Shoenberger's land as is now in dispute. This, as nearly as he remembers, was in 1846 or 1847 that he ran that line, after or about the time the work was completed. At the time of the construction of the reservoir much of the Shoenberger tract was covered with timber. This, under the direction of the commonwealth's officers, was cleared off; and although Shoenberger took the timber, it was claimed by the commonwealth; and as it formed part of the compensation to be paid to the contractors for clearing they were allowed $700 for it.

According to the testimony of Wierman, surveys and maps of the whole 539 acres were made by him, including the Shoenberger portion, and transmitted to the canal commissioners. Search has been made for these maps, but they have not been found and are not produced here. Wierman testifies to the running of the lines and the making of the maps, and he remembers distinctly of transmitting them by stage in a tin case to the commonwealth's officers at Harrisburg.

On March 6, 1847, Shoenberger made application to the canal commissioners for compensation for the damages caused

by the taking of these 129 acres; and $2,450 were awarded him in full, and that amount was paid to him. Whatever the commonwealth did, by way of taking land for the purpose of this reservoir, was done under and by authority of the legislation of 1836 and subsequent statutes for the construction of public works, or internal improvements, between the west and the east. The reservoir was not a distinct improvement, it was part of the canal just as much as any other portion not the actual boat channel was part of the canal. The legislation authorizing the construction of the canal authorized the construction of sufficient reservoirs to make the canal navigable in dry seasons. It is not material that the construction of canal and reservoir were not simultaneous. The reservoir might be constructed years after the completion of the main channel, under the authority of the general legislation authorizing the construction of the internal improvements.

Under our present impression of the law we instruct you that if the commonwealth in fact appropriated this land for the purpose of the reservoir, then it took an absolute estate in the land in perpetuity, and that estate is vested in this plaintiff.

The question, then, is: Did the commonwealth appropriate this land? It was not necessary it should have a deed. It was not necessary it should actually make permanent monuments upon the ground to show the extent of its claim. The map of Morris, the subsequent surveys of Wierman and Garrigues verifying that map of Morris, and the testimony of Wierman showing that he ran the lines and made maps himself at the time show conclusively that it was intended by the commonwealth to appropriate this land up to the line four feet above the water level at the waste weir of the reservoir. This testimony is not disputed; and we say to you that that was sufficient appropriation of the land to give title to the commonwealth, to the extent to which it could acquire title under the legislation then existing.

On the part of the defendants it is argued that an estate in perpetuity was not taken; that the commonwealth was the owner only of that portion of the land which formed the bed of the canal proper, and that the statute expressly stipulated that nothing but an easement could be acquired to any land taken for any other purpose; and as the reservoir formed no part of the bed of the canal on its abandonment the land reverted to the former owners, and therefore there can be no recovery in this case; or

that, at most, the plaintiff cannot recover for more land than was embraced within the water line from the sluice, being about eighty acres. We desire to give a further examination to this question, and we therefore reserve our answer to this point made by the counsel for the defendants.

The counsel for the defendants has also submitted the following written points:

1. The commonwealth, being the owner of the McCune tract, and having erected thereon a dam whereby the water backed on the land, did not acquire a fee in any part of said land.

Ans. This point is reserved.

2. If, in fact, the canal commissioners only appropriated the right to back water upon the land of Dr. Shoenberger, leaving to him the use of the land consistent therewith, the plaintiffs cannot recover.

Ans. The evidence shows, without dispute, that the commissioners undertook to appropriate the land. The point is denied.

3. If the commonwealth, in fact, appropriated only so much of the land of Dr. Shoenberger as is embraced by the water line from the sluice, about 80 acres, as is shown by Mr. Garrigues, the verdict cannot exceed that line."

Ans. This point is denied.

4. There being no description of the land in the petition or receipt and nothing thereon from which a survey could be made, the plaintiff cannot recover.

Ans. This point is denied.

Verdict directed for the plaintiff for the land described in the writ, subject to the opinion of the court upon the point reserved.

Afterwards the court filed the following opinion:

It is not disputed that the commonwealth did, by the construction of the breast of the dam or reservoir upon the land purchased from McCune, back the water over the land of defendants, at that time the property of Peter Shoenberger. Perhaps the mere backing of the water, without more, would have given no title to the commonwealth. But in considering this question we cannot leave out of view the other undisputed facts in the case.

These facts were clearly proven and were not disputed: The canal commissioners established as the area to be appropriated

so much land as would be covered by a water line four vertical feet above the waste weir at the western end of the reservoir. The evidence showed beyond dispute that such a water line would embrace or include the land in controversy. Two maps were put in evidence certified from the auditor general's office: one made in 1839 by Elwood Morris, and one made in 1840 showing the McCune survey. The water line proposed on each of these maps for the reservoir afterwards constructed would take in this land, but the one made in 1840 did not purport to plot the entire reservoir site. The deed from McCune to the commonwealth in 1841 specifies the water line as 4 feet in height above the water way at western end of dam. In 1846 Thomas Wierman, engineer for the state, ran the line around the entire reservoir tract and made notes of his survey; he marked the line with stakes; he ran the line on the Shoenberger tract and others; made maps of his work and transmitted them to the commissioners.

These maps are now lost, but a map of the line on Shoenberger's land was made at his, Shoenberger's, request, who made an application to the canal commissioners for damages, claiming damages per acre for 128 acres. He was awarded $2,460, and afterwards took the timber from the land, which, added to the $2,460, made about $25 per acre for the 128 acres. The number of acres in the tract now in dispute, by exact measurement, is 129 acres and 42 perches. A large portion of the land during the existence of the reservoir was constantly flooded. Sometimes it would be flooded back to the 4-foot vertical water line and cover the whole. From a survey made by Mr. Garrigues, engineer, a map of which was put in evidence showing the line run by Mr. Wierman in 1846 to correspond with the present 4-foot vertical line above the water way at western end of dam.

This evidence was not contradicted; the credibility of the witnesses was not questioned. It shows more than a mere flooding of defendants' land by backing the water; it shows a distinct, unequivocal appropriation of the land by the commonwealth for reservoir purposes; and if this appropriation was by authority of law the fee of this tract, 129 acres and 42 perches, was vested in the commonwealth, and by the sale of the main line in 1857 passed to the plaintiff.

The acts of April 11, 1825, P. L. 238; April 9, 1827, P. L. 192; March 24, 1828, P. L. 221; March 21, 1831, P. L. 181;

July 19, 1839, P. L. 631; and January 21, 1846, with the constructions put upon them in Com. v. M'Allister, 2 Watts, 197; Haldeman v. Pennsylvania C. R. Co. 50 Pa. 425; Pennsylvania Canal Co. v. Harris, 12 W. N. C. 432, clearly gave the canal board authority to appropriate this land for canal purposes. The mode of appropriation was sufficient to invest the commonwealth with the fee; and as a consequence of the sale of the public works in 1857 this plaintiff took the same title held by the commonwealth.

It follows, then, if this land was flooded by the commonwealth, after an authorized appropriation of it by its officers, the defendants have no title or right of possession.

This point is denied.

Judgment was accordingly entered for the plaintiff.

The assignments of error specified respectively the answers to the defendants' four points, and the action of the court in directing a verdict for the plaintiff.

Samuel S. Blair, for plaintiffs in error.—The title of the plaintiff below depends entirely upon the statute and the payment of damages to Dr. Shoenberger, under whom both parties claim. The defendants below contend that the commonwealth acquired but an easement in the land, and that as it has been abandoned the land is now open to their unrestricted enjoyment, they having succeeded to the title of Dr. Shoenberger.

Although the statute of 1827, in connection with that of 1826, gave a fee to the bed of the canal it was a determinable fee—to cease on the abandonment of the canal. Judge PEARSON, who well understood the general sentiment, says in Haldeman v. Pennsylvania C. R. Co. 50 Pa. 432, that he was constrained by Union Canal Co. v. Young, 1 Whart. 410, 30 Am. Dec. 212, and Com. v. M'Allister, 2 Watts, 190, to hold the title a fee simple absolute, although it did not accord with his views and was in conflict with the opinion of the legal profession through the state, and the habits and practices of the people.

And even so lately as the case of Wyoming Coal & Transp. Co. v. Price, 81 Pa. 156, the present chief justice declares that if the question were *res integra* it would be otherwise decided. The doctrine of an absolute fee in the bed of the canal is, of course, now protected by the rule of *stare decisis.*

But the act of 1827, while it changed the mode of redress for cutting the canal through the owner's land, extended the remedy to injuries "by interfering in any manner with his rights of property."

Redress for injuries by cutting the canal through the land was to be by giving up the fee upon compensation by the state. The act is silent with regard to any interest the state might acquire through compensation for any other interference with the rights of property. The inference is legitimate that the state did not intend the acquisition of a fee by any such interference. Com. v. Snyder, 2 Watts, 418; Vanhorne v. Dorrance, 2 Dall. 316, 1 L. ed. 396, Fed. Cas. No. 16,857.

There can be no doubt that all parties understood the damages to be put compensatory of an easement.

Assuming that the commonwealth would take a fee it was necessary for the plaintiff to define the land appropriated. No description of the land was made. There were no enduring memorials of what was actually taken, as there would be when the land is taken for the canal. The bed and berme bank would mark the limits. There were no marks showing the water line. The effort was to fix a line from the deed of McCune which established the line of the purchase from him by assuming a level four feet vertical above the bed of the waste way.

The fact was that it required a flood to raise the water to the level of the waste way. At the ordinary stage of water Shoenberger's land was almost clear. The adjoining owners cultivated their land. The fact that in making the purchase from McCune they bounded the land by a water-level line was not even admissible evidence of the Shoenberger line. It might have been 50 feet above the waste way on the McCune purchase, but it would not follow that the same line would apply to the owners above who were paid damages. The question of location is essentially a question of fact, and it should have been left to the jury to determine what land was actually appropriated.

Daniel J. Neff, for defendant in error.—The acts of assembly and all the authorities were reviewed in the case of Wyoming Coal & Transp. Co. v. Price, 81 Pa. 174, and it was held that whenever land was taken for permanent use, under the acts in question, the commonwealth acquired an estate in perpetuity.

Two kinds of occupation were plainly in view,—one perma-

nent and continual; the other temporary or of limited duration, such as might be required for the deposit of materials, or accommodation of the workmen, while the canal was in process of construction; the former of the land occupied by the canal and its necessary works, and the latter of that required to be used only during the period of construction. Haldeman v. Pennsylvania C. R. Co. 50 Pa. 425; Craig v. Allegheny, 53 Pa. 479.

The fact that all the land was not continuously flooded, or the permissive occupancy of a small portion of the land by Shoenberger, or his successors, occasionally for pasture, did not affect the title of the commonwealth. Such occasional possession or permissive occupancy was not a hostile or adverse holding, it was in subservience to the commonwealth's title. Union Canal Co. v. Young, 1 Whart. 425, 30 Am. Dec. 212; Buckholder v. Sigler, 7 Watts & S. 159; Craig v. Allegheny, 53 Pa. 477.

It was held in Robinson v. West Pennsylvania R. Co. 72 Pa. 316, that the commonwealth acquired the fee in the basin also, the portion excepted in the Robinson deed, although the basin was not defined or described, but merely occupied and no damages were assessed or paid and no release given.

There was a more exclusive dominion exercised over the reservoir than over the canal itself; for during a portion of the year there was no water in the canal, and it was not used for purposes of navigation.

Under the act of 1826 the jury were required to value the land and damages. The act of 1827 made no essential change in this respect. Under either act consequential damages could be allowed.

In Com. v. Snyder, 2 Watts, 418, there was no appropriation of complainant's land, no defining of it by a property line. It was a case of consequential damages. The ownership of land was not under consideration.

PER CURIAM:

The boundaries of the land seized for the use of the state were sufficiently defined, and that the fee thereto vested in the commonwealth is a matter now so well settled by previous decisions that discussion concerning it is unnecessary.

The judgment is affirmed.

Township of Shippen, Plff. in Err., *v.* H. D. Burlingame.

In the absence of clear and satisfactory evidence of fraud or mistake, the date affixed by the township auditors to a settlement made by them, shall be regarded as conclusive in determining whether an appeal is in time.

The report of the township auditors of Shippen township settling the accounts of the supervisors for the year ending March, 1885, was entered in the township book under date of April 13, 1885. This report, without date, was published in the county papers on April 16. On May 8 a copy was sworn to and filed in the office of the clerk of the quarter sessions. On the same day an appeal was taken from the decision of the auditors; and subsequently a rule was taken to strike off the appeal because not filed within thirty days from the settlement, and evidence was submitted to show that the report was concluded before the day it bore date. *Held*, that there was nothing inconsistent in this evidence that they held the report under advisement until the day it bore date, and in the absence of satisfactory evidence of fraud or mistake the date affixed to the report was conclusive and that the appeal was within the time prescribed.

(Argued May 10, 1887. Decided October 3, 1887.)

July Term, 1886, No. 134, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Cameron County to review an order of the court striking off an appeal from a settlement by the township auditors of the accounts of H. D. Burlingame, supervisor of Shippen township. Reversed.

The appeal from the settlement was filed May 8, 1885; subsequently a rule was granted to show cause why the same should not be stricken off because not filed within thirty days after the settlement as required by the act of April 15, 1834. An issue was framed wherein Burlingame was plaintiff and the township was defendant and evidence was introduced to contradict the date of the auditors' report as made by them.

The material facts are stated in the opinion.

The court made absolute the rule to strike off the appeal.

The assignments of error specified the action of the court in considering the parol evidence and in making absolute the rule to strike off the appeal.

Newton & Green, for plaintiff in error.—There is but one

question in this case for the consideration of the court, and that is this:

Can the record so made in pursuance of the acts of assembly and relied upon by the whole world be contradicted by parol testimony, the taxpayers deprived of the right of appeal given them by law, and compelled to pay a bill of costs for their temerity?

In the cases of Louderback v. Boyd, 1 Ashm. (Pa.) 380; Read v. Dickinson, 2 Ashm. (Pa.) 224; Snyder v. Snyder, 7 Phila. 391; Kelly v. Gilmore, 1 W. N. C. 73; and McIlhaney v. Holland, 111 Pa. 634, 5 Atl. 731, it was held in substance that a party cannot be deprived of his right of appeal by the wilful or accidental act or omission of a justice of the peace, when he is ready and willing to comply with all the legal prerequisites to an appeal.

It is true that these cases all relate to appeals from justices' courts when the appeal has not been taken in time on account of some act of the justice; but the principles upon which all the cases were decided were the same as those involved here.

In Halliday v. Mills, 3 Clark (Pa.) 394, it was held that the transcript of a justice cannot be altered by parol evidence even where the allegation was that he had entered judgment upon a confession that was never made.

Records import absolute verity, and cannot be contradicted by evidence, although by a witness of the best credit, and must be tried by themselves, and admit of no averment to the contrary. Adams v. Betz, 1 Watts, 425, 26 Am. Dec. 79; Duff v. Wynkoop, 74 Pa. 300; Rice v. Constein, 89 Pa. 477.

A record will not even be amended by the proper court, when third parties have acted upon it or their interests have intervened.

The board of auditors was created by the act of April 15, 1834, which, after authorizing their election, provides that "the auditors of each township, any two of whom, duly convened, shall be a quorum, shall meet annually, . . . and shall audit, settle, and adjust the accounts of the supervisors."

The law also provides that the auditors shall file their report with the town clerk and a copy with the clerk of the court of quarter sessions. It also provides for an appeal therefrom by the officer, the township, or any taxpayer on behalf of the township.

Here we have a court or tribunal provided for the trial and settlement of all accounts between the supervisors and the township, with provisions for making its proceedings a matter of record; and it has been held that it has exclusive jurisdiction over the settlements of supervisors' accounts with the townships.

A supervisor has no other mode of settling his accounts, as such, but before the township auditors, and by appeal from their decision. Dyer v. Covington Twp. 28 Pa. 186.

He cannot maintain a common-law action against the township. Brown v. White Deer Twp. 27 Pa. 109.

Their settlement is conclusive except on appeal. Porter v. School Directors, 18 Pa. 144; Short v. Gilson, 107 Pa. 315.

A party is estopped by what he has alleged or admitted of record. Ranck v. Becker, 12 Serg. & R. 426; Taylor v. Parkhurst, 1 Pa. St. 200; Spaulding v. Eimers, 3 Pittsb. L. J. 306; Anderson's Appeal, 4 Yeates, 35; Greeley v. Thomas, 56 Pa. 35; Kenner v. Postens, 21 Phila. Leg. Int. 21; Hostetter v. Hykas, 3 Brewst. (Pa.) 162.

J. C. Johnson, for defendant in error.—A writ of error does not lie in this case. The act of April 15, 1834, requiring the township auditors to settle the accounts of the supervisors, and providing for an appeal to the court of common pleas, does not allow exceptions or a writ of error. The amendment to this act, by the act of May 1, 1876, under which the appeal in this case was attempted by a taxpayer, does not allow exceptions or a writ of error. The whole proceeding is statutory, and not according to the course of the common law; and therefore a writ of error does not lie under the act of May 22, 1822. Purdon's Digest, pp. 702–704; Gangewere's Appeal, 61 Pa. 342; Ruhlman v. Com. 5 Binn. 24.

No bill of exceptions was taken and sealed by the court in this case, and none could have been. The act of 13 Edward I. chap. xxi. in force, allowing exceptions, does not apply to the admission or rejection of evidence on a motion for summary relief. Murphy v. Flood, 2 Grant Cas. 411; Miller v. Spreeher, 2 Yeates, 162; Lindsley v. Malone, 23 Pa. 24.

The depositions are therefore not before this court, upon the record, and cannot be considered; but the lower court having the power to quash or strike off the appeal, on extrinsic evidence which cannot be put on the record, the presumption is that every-

thing was done rightly and according to law. Brown v. Ridgway, 10 Pa. 42; Banning v. Taylor, 24 Pa. 289.

If it should be held that a writ of error is well taken in this case, yet no exception was taken; and no bill was sealed in the court below for the plaintiff in error, to the considering by the court of the parol evidence, as set forth in the first assignment of error. As this exception was not taken in the court below it will be considered as waived. Rank v. Rank, 5 Pa. 215; Walters' Appeal, 1 Pa. S. C. Dig. 333; Dawson v. Robinson, 3 W. N. C. 449; Wright v. Wood, 23 Pa. 120; Kemmerer v. Edelman, 23 Pa. 143; Dorman v. Pittsburgh & S. Turnp. Road Co. 3 Watts, 126; Philadelphia, W. & B. R. Co. v. Conway, 112 Pa. 511, 4 Atl. 362; Williams v. Elliott, 4 Pennyp. 424; Yeager v. Fuss, 9 W. N. C. 557; Passenger Conductors' L. Ins. Co. v. Birnbaum, 19 W. N. C. 277.

The second assignment is not a valid assignment of error. "The assignments of error are an essential part of the pleadings in this court, and as such should be so complete in themselves as not to require reference to other parts of the record. . . . It must be obvious, therefore, that each specification of error should, in and of itself, present the question we are called upon to decide." Landis v. Evans, 113 Pa. 332, 6 Atl. 908.

If the court should entertain the writ and sustain the sufficiency of the assignments of error, and consider the merits of the case, it would be found that the account was settled at least forty-three days before the appeal was taken and the appeal was therefore too late by thirteen days, and for that reason among others it was rightly struck off. Purdon's Digest, p. 1641, pl. 42.

By § 102 of the act of April 15, 1834, the auditors are required to settle and adjust the accounts of the supervisors. By § 103 of the same act they are required to file their report with the town clerk, if there be one; and if not it shall remain with the senior auditor for inspection of all persons concerned. By § 104 of the same act, the appeal within thirty days after such settlement is allowed. By the act of April 14, 1851, § 19, and by the act of May 1, 1876, § 1, the right to appeal is extended to any taxpayer. The act of June 4, 1876 (P. L. 94) requires the auditors to meet annually on the second Monday of March for the settlement of the supervisors' accounts. These are all

the acts that relate to the accounts, as accounts. Purdon's Digest, 1641, 1642, pl. 30, 41.

Section 2 of the act of April 24, 1874, requires the auditors to publish an itemized annual statement of the receipts and expenditures of the supervisors, for the year preceding the annual settlement, by posting hand bills within ten days after such settlement, and further, to file a copy of the same with the town clerk, and also with the clerk of the court of quarter sessions, which shall be at all times subject to inspection by any citizen.

The plaintiff in error contends that these itemized annual statements of receipts and expenditures filed in this case with the town clerk, and the clerk of the quarter sessions, are records; that they govern the right of appeal, and are of such a high character that they import absolute verity. In this, I think, he is mistaken. At best all these papers, for which there is not even a provision made for recording, are only public and official writings. When produced from the proper custody, they are, perhaps, in proper cases, prima facie evidence, but may be explained. Chapman Twp. v. Herrold, 58 Pa. 106; Thompson v. Chase, 2 Grant Cas. 367.

Whenever the time of the execution of any writing, even of the most solemn kind, becomes material, it may be proved by parol. Draper v. Snow, 20 N. Y. 331, 75 Am. Dec. 408.

In Parker v. Luffborough, 10 Serg. & R. 249, parol evidence was given to show that a mistake was made in the affidavit of an assessor filed in office, and Com. v. Blaine, 4 Binn. 186, was cited, where the court suffered a mistake in the registry of a slave to be supplied by parol.

In Thomas v. Wright, 9 Serg. & R. 87, the day on which a sheriff's inquisition was held was shown by parol.

In Hillary v. Pollock, 13 Pa. 186, the date in the bill of particulars in a mechanics' lien was corrected by parol evidence.

In Greiss v. Odenheimer, 4 Yeates, 278, 2 Am. Dec. 407, the correct time of the execution of a mortgage was shown by parol.

If these papers were records yet they could be contradicted by parol for fraud (Thorne v. Travelers' Ins. Co. 80 Pa. 15, 21 Am. Rep. 89; Lowry v. McMillan, 8 Pa. 157, 49 Am. Rep. 501); or whenever a fraudulent use of them was attempted.

OPINION BY MR. JUSTICE STERRETT:

The account of defendant in error as one of the supervisors of

Shippen township, for the year ending March, 1885, was settled by the township auditors; and their report thereof entered in the township book under date of April 13, 1885. The report, without date, was published in two of the county papers issued on the 16th of same month. On May 8 a copy thereof was filed in the office of the clerk of quarter sessions, and on the following day a similar copy of the account, sworn to by the supervisors, was filed with the township clerk.

On the day the report was filed in the court of quarter sessions, George Edwards, a citizen and taxpayer of the township, on its behalf, appealed from the decision of the auditors to the court of common pleas; and in November following the court directed an issue to determine the disputed facts. Plaintiff below thereupon moved for a rule to show cause why the appeal should not be stricken off. Pending the rule he also filed a declaration, embodying a copy of the auditors' report and concluding thus: "This report was dated April 13, 1885, sworn to on May 8, 1885, and filed with quarter sessions clerk."

It was not even alleged that these dates are erroneous, or that the report had been made before it purports to have been. Depositions having been taken for the purpose of showing that the settlement had been concluded by the auditors and entered in the township book more than thirty days before the appeal was taken, the rule was made absolute and the appeal stricken from the record. It is contended there was error in thus summarily disposing of the appeal, and we think there was.

The evidence upon which the court appears to have acted was insufficient to justify the conclusion that the report of the township auditors was not finally concluded and adopted by them on the day it bears date.

It is not inconsistent with the fact that the account of defendant in error was submitted to the auditors in March, 1885, and by them held under advisement until the day the report bears date. There is nothing to show that the date appended to the report was unauthorized by the auditors, or that their authority in the premises had been previously exhausted. In the absence of clear and satisfactory evidence of fraud or mistake, the date affixed to such reports should be regarded as conclusive in determining whether an appeal is in time or not. If it were otherwise, taxpayers and other interested parties might often be misled to their injury.

The order of Court striking off the appeal is reversed and vacated, appeal reinstated, and *procedendo* awarded.

Township of Shippen, Plff. in Err., v. N. S. Lewis.

(Argued May 10, 1887. Decided October 3, 1887.)

July Term, 1886, No. 135, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Cameron County to review an order of the court striking off an appeal from a settlement by the township auditors of the accounts of N. S. Lewis, supervisor of Shippen township. Reversed.

The facts of this case were similar to those in the case of Shippen Twp. v. Burlingame, *ante,* 258, and the two cases were argued together.

Newton & Green for plaintiff in error.

J. C. Johnson for defendant in error.

OPINION BY MR. JUSTICE STERRETT:

The question presented by this record is substantially the same as that just disposed of in same plaintiff in error v. Burlingame, *ante,* 258.

For reasons given in opinion filed in that case the assignments of error are sustained.

The order of court striking off the appeal is reversed and vacated, appeal reinstated, and *procedendo* awarded.

Mary Mangan's Appeal.*

Under the act of February 24, 1834, § 34, a sale of a decedent's real estate on a judgment against his administrator to which his widow and heirs are not made parties by scire facias does not devest the title of the heirs.

*NOTE.—It will be noticed in this case that the judgment upon which the sale was had was recovered subsequent to the death of the decedent. The widow and heirs, not being made parties, the proceedings were invalid.

The same rule applies where the decedent's widow is his administratrix.

It seems that creditors of decedents are not strangers to their estates, but have by law a right to intervene and require the estates to be sold, even where the widow and heirs or representatives refuse to do so.

(Argued April 13, 1887. Decided October 3, 1887.)

January Term, 1887, No. 284, E. D., before MERCUR, Ch. J. GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Orphans' Court of Luzerne County confirming absolutely a sale of decedent's real estate for the payment of debts. Affirmed.

Before L. B. Landmesser, Esq., the examiner to whom the petition of Mary Mangan, widow and administratrix, for the sale of Michael Mangan's real estate for the payment of his debts was referred, the following facts appeared:

Michael Mangan, March 10, 1874, entered into a written contract with Charles Pugh, for the purchase of the lot of land described in the petition, for the price of $5,700, payable: $500 down; $560 November 1, 1874; $464 April 1, 1875, and the balance in semi-annual payments of $464 each, on the first day of October and April in each year until all said sum should be paid, with interest to be paid annually on the whole sum unpaid from date of contract, confessing judgment for said sum of $5,700, and waiving inquisition of real estate and the benefit of all exemption laws.

Michael Mangan went into possession of the property and made the following payments: $500, on March 10, 1874; $564.50, on November 7, 1874; $464, on April 1, 1875, and the interest to that date; and $464, on October 5, 1875.

He died intestate and insolvent July 21, 1880, seised and possessed of an equitable interest in the land, and leaving to survive him a wife, the petitioner, Mary Mangan, and the following children,—to wit, John J., Thomas F., Dennis A., Ellen, Mary, Michael, and James.

Letters of administration upon the estate were duly granted to Mary Mangan, his widow.

This is not necessary where the judgment is obtained in the lifetime of the decedent, and the scire facias is issued for the purpose of lien, or execution. Grover v. Boon, 124 Pa. 399, 16 Atl. 885; Middleton v. Middleton, 106 Pa. 252. See also Colenburg v. Venter, 173 Pa. 113, 33 Atl. 1046.

At date of the decedent's death, there was still due upon the contract $4,944.13. His indebtedness exclusive of the purchase money amounted to $11,079.14, while his personal property amounted to only $1,078.36.

G. W. Cunningham had recovered a judgment against the decedent in his lifetime, and November 4, 1881, issued a scire facias upon the judgment against Mary Mangan, administratrix. October 8, 1883, upon the verdict of a jury a judgment was entered in favor of the plaintiff, in the sum of $1,917.27.

January 8, 1881, Charles Pugh brought an action of debt upon the contract against Mary Mangan, administratrix. The summons was duly served, and January 31, 1881, judgment was entered for want of an appearance for $5,055.26. No notice was served upon the heirs.

March 8, 1881, a fieri facias issued upon the judgment in favor of Pugh, and, the administratrix having waived inquisition and exemption, the land was levied upon and sold by the sheriff, April 9, 1881, to Charles Pugh, the plaintiff, for $1,455, and a deed for the same was acknowledged by the sheriff in open court, May 9, 1881.

By deed dated May 14, 1881, acknowledged the same day, and duly recorded, Charles Pugh conveyed said land to Mary Mangan.

January 15, 1886, Cunningham issued a writ of *venditioni exponas* upon his judgment, by virtue of which the sheriff seized and took in execution the right, title, and interest of decedent in the land, and advertised the same for sale.

March 4, 1886, John Mangan, a son and one of the heirs of said decedent, presented his petition to the court of common pleas, setting forth that the personal estate of said decedent was insufficient to pay all the just demands upon his estate, and praying the court to stay the execution issued upon the judgment of Cunningham until the administratrix made application to the orphans' court for the sale of the decedent's real estate; whereupon the court of common pleas ordered the writ to be stayed, on condition that the administratrix make an application for the sale of decedent's real estate to the orphans' court on or before March 6, 1886, and further ordered that said administratrix make said application as aforesaid.

This petition was then filed, under protest, by the administratrix.

The petitioner admitted that the sale upon execution of the Pugh judgment was void as to the heirs of the decedent, but claimed that it was good as to his creditors.

It was also conceded that if no title whatever passed to the purchaser at said sale it was the duty of the orphans' court to order a sale of the equitable interest of decedent in said land for payment of debts.

The examiner stated, as follows, the law applicable to the case:

Prior to the act of February 24, 1834, a creditor could sell the real estate of a decedent upon a judgment obtained against an administrator or executor without warning to the heirs. To remedy this imperfection in the law, and also to prevent any collusion between an administrator or executor and a creditor, whereby parties interested in said decedent's estate, would be deprived of their rights, the act of February 24, 1834, was passed, and in § 34 of said act it was provided, that "in all actions against executors or administrators of a decedent who shall have left real estate, where the plaintiff intends to charge such real estate with the payment of his debt, the widow and heirs or devisees and the guardians of such as are minors, shall be made parties thereto, . . . and if notice of such writ shall not be served on such widow and heirs or devisees and their guardians the judgment obtained in such action shall not be levied or paid out of the real estate of such widow, heirs, or devisees."

That is, it shall not be levied or paid out of the real estate which descended to them from the decedent or debtor. Murphy's Appeal, 8 Watts & S. 165.

It is only by a full compliance with this act of assembly that a creditor can charge the real estate of decedent with the payment of his debt.

Pugh having brought his action on the case against the administratrix of Michael Mangan and obtained judgment thereon against her alone, and the heirs not having been warned by scire facias as is required by said act of assembly, he was prohibited from selling the real estate of said decedent, as the said act says no execution shall issue until after notice has been given to the heirs, etc., and the sale made upon said judgment without having warned the heirs, etc., is absolutely null and void and passed

no title to the purchaser. Leiper v. Thomson, 60 Pa. 177, and cases there cited; Walthaur v. Gossar, 32 Pa. 259.

Not only must there be a legal judgment but a legal execution also to make a sheriff's sale valid. Pugh having issued an execution upon a judgment against the administratrix alone, without first having given notice to the heirs, which he is prohibited from doing by said act of assembly, he stands as a purchaser at sheriff's sale under a void process, and he gets no title whatever at said sale; consequently Mrs. Mangan, the vendee of Pugh, gets no title; and the equitable title to said lands still remains in the estate of Michael Mangan, deceased, and is in precisely the same condition it was in at the instant Michael Mangan died.

The proposition advanced by counsel for petitioner that while this sale is void as to heirs, it is good as to creditors, cannot be sustained for a moment; for how can they be affected by a sale made upon a void process? Lands descend to heirs and not to administrators. Haslage v. Krugh, 25 Pa. 97.

At the instant Michael Mangan died his equitable interest passed to his heirs,—that is, they had a contingent interest therein defeasible in behalf of creditors.

When on the 20th day of July, 1880, Michael Mangan died intestate and indebted, his personal estate passed by operation of law to his administratrix, in trust primarily for creditors; and his equitable interest in said land descended to his seven heirs, subject to the jurisdiction of the orphans' court to reclaim it for purposes of conversion into money to pay debts which the personalty should prove insufficient to pay. Horner v. Hasbrouck, 41 Pa. 179.

At the moment of an insolvent's death the rights of the creditors become fixed, and they are to be regarded, not as creditors, but as equitable owners. Cairns's Estate, 13 Phila. 350.

The creditors of Michael Mangan have, therefore, such an interest in his real estate that they stand upon an equal footing with his heirs; for if it were not so the orphans' court would be stripped of its jurisdiction by said sale and the creditors would be deprived of the privilege of enjoying the fruits of a full administration of their debtor's estate.

Considerable stress was laid by counsel for petitioner upon the case of Riland v. Eckert, 23 Pa. 215, where it was held that a sale of lands upon a judgment obtained against an adminis-

trator is not void as to others than heirs and devisees, that though the latter may not be concluded by the judgment, strangers and intruders may not treat it as void on account of want of notice to the heirs.

But that is not an analogous case, for there the contest was not, as in this case, between a purchaser at sheriff's sale and a creditor of the decedent, but between the purchaser and a party setting up a title independent of any the decedent had in his lifetime, one who was not interested in the decedent's estate, either as heir or devisee or vendee of an heir or devisee, or as the creditor of the decedent.

In addition to all this Mrs. Mangan, either in her own right or as administratrix, does not stand in a position to say that the estate of the decedent has no interest in said land, and that, therefore, there is nothing that the orphans' court can order to be sold. For the very application and affidavit upon which the court of common pleas compelled her to make application to the orphans' court for sale of said lands was made by John Mangan, a son, and one of the heirs of said decedent; and it is admitted on her part that the sheriff's sale upon the judgment of Pugh against her was null and void as to the heirs.

The examiner reported the following conclusions of law:

1. The sale by Pugh upon his judgment against the administratrix alone was null and void, not only as to the heirs, but also as to creditors.

2. No title whatever to the equitable interest of the decedent in the land passed to the purchaser of said sale, and therefore Mrs. Mangan, the vendee of said purchaser, received no title to the same.

3. All that Mrs. Mangan received by her purchase from Pugh was the legal title still existing in him and the right to receive the balance of purchase money due upon his contract.

4. The orphans' court has complete jurisdiction in this matter, and it is the duty of the court to order the land to be sold for the payment of the debts of decedent.

The examiner therefore recommended that an order be granted directing the administratrix, the trustee, to sell the interest of decedent in the land described in the petition for the purpose of paying his debts, subject to the amount of purchase money due Pugh at the time of decedent's death.

Upon overruling exceptions to the examiner's report and entering a decree in accordance with his recommendation, RHONE, P. J., delivered the following opinion:

We have concluded to confirm the report of the examiner and make the following argument in addition to what he has stated. It is shown by KENNEDY, J., Murphy's Appeal, 8 Watts & S. 168, that § 34 of the act of 1834, under which this dispute arises is not clear when read literally, and hence it "must receive a reasonable construction and be interpreted according to the subject-matter of it instead of adhering to the letter," but, it seems to us that both the letter and the spirit of the act require notice from the intestate's creditors to the widow and heirs of an intestate before the land can be sold on an execution from the common pleas.

The real estate of every decedent belongs to his widow, heirs, or devisees; and hence the letter of the act cannot be complied with, in any case, without a judgment against them. No judgment against an administrator alone can be "levied or paid" out of any decedent's real estate if the letter of the act is to be adhered to, and no judicial authority has been produced or found to the contrary unless it be Riland v. Eckert, 23 Pa. 215, which we shall discuss further on.

It was decided in Leiper v. Thomson, 60 Pa. 177, that where real estate is devised to executors to sell, the widow and legatees interested in the fund are not entitled to the notice for the reason that the executor thus becomes the owner of the land for purposes of sale and because under the terms of such a will the real estate becomes converted into personalty.

The spirit of the act has been extended so as to include the alienee of an heir or devisee. Soles v. Hickman, 29 Pa. 342, 72 Am. Dec. 635.

The reasoning of all the cases under this section is twofold: First, that the land shall not be taken from its owners (the widow, heirs, or devisees) by executor, without a judgment against them; and, second, that it shall not be in the power of the personal representative of a decedent to conspire with any real or pretended creditor to sacrifice the estate. It has been said that the act "was designed to protect the estates of dead men from those collusive judgments which are sometimes concocted between faithless administrators or executors and pretended creditors;" and we see equal reason for protecting cred-

itors of a decedent from collusion between faithless administrators and the widow, heirs, or devisees of dead men. If such sales as the one in question must be allowed to stand as valid against all of the decedent's creditors, then we can conceive of no better method to sacrifice the real estate of decedents, for all bidders at such sales are bound to know that the sale would be void at the election of the heirs and widow or any purchasers from them. The widow and heirs might bid against creditors and then repudiate the sale afterwards. In all cases they would reap the fruits of the sale and keep the land too.

The result in all such cases would be that the widow and heirs would get the land at their own price, or repudiate the sale, which must inevitably jeopardize the interests of all creditors, including the plaintiff in the execution.

After a judgment against the widow and heirs, a sheriff's sale would bind all parties; and competition between bidders would prevent any sacrifice or unfairness. All parties interested would be in equal position.

It is admitted that in such cases the title of the widow and heirs would not pass; and this being so, no title could pass, for no one else has any. The interest of the creditors of an estate is not a title but a lien; and how can their lien be devested by a sale which passes no title?

There must be a judgment against the heir as such before a valid levy can be made on the land. Atherton v. Atherton, 2 Pa. St. 112.

The act means that the judgment obtained against the administrator alone shall not be paid by force of an execution issued thereon against the lands. Murphy's Appeal, 8 Watts & S. 165.

The act is a rule of action and not of lien. Sample v. Barr, 25 Pa. 457.

These are some of the *dicta* of the cases. The only adjudicated case looking toward any other conclusion than the one at which we have arrived is Riland v. Eckert, 23 Pa. 215, and yet that case decided no more than that while such a sale may be void, as between parties immediately interested, it cannot be so treated by a mere stranger to the estate.

Such a sale may not be absolutely void, but certainly is relatively void in the sense in which those terms are defined in Seylar v. Carson, 69 Pa. 81.

If the creditors of a decedent, as also all his heirs, are satis-

fied with such a sale, it may well be held that a mere stranger shall not be allowed to question it, and yet not disturb the principle or rule which we have undertaken to establish.

The question here is not whether the sheriff's sale is void or only voidable between the purchaser and the heirs, but whether it is not voidable between the purchaser and the other creditors of the decedent. The land in question either belongs to the purchaser at the sheriff's sale or his alienee, or else it belongs to the heirs as heirs, and if to the latter, it must still be subject to the debts of their ancestor. It cannot be that the whole title to the land hangs in any such balance as will permit the rights of the creditors to stand on the election of the widow and heirs alone.

The exceptions to the report of the examiner are dismissed and the report is confirmed absolutely. A sale of the interest of the decedent in the land described will be ordered on presentation of a decree by counsel. The costs of this proceeding to be paid by the exceptant.

The assignments of error specified the action of the court in ordering the sale, and in subsequently confirming it absolutely.

John T. Lenahan and *George S. Ferris,* for appellant.—Notice to the widow, heirs or devisees, etc., is not a statutory requisite of title independent of their interest in the land. The section referred to was only intended for the benefit of widow, heirs and devisees, and only prohibits a sale by execution of their interest without notice to them.

Formerly a sale of real estate on a judgment obtained against the administrator for a debt of the decedent without joinder of heirs, etc., would devest their interest without affording them an opportunity to contest the judgment.

To remedy this imperfection in the law, and for no other purpose, § 34 of the act of February 24, 1834, was passed. It operates solely for the benefit of widow, heirs, and devisees or their alienee,—not for the benefit of creditors. They are neither within the letter nor the reason of the act.

The mischief sought to be remedied was the danger to heirs and devisees in the negligence or collusion between the personal representatives (often strangers to them) and claimants against decedents' estates. Sergeant v. Ewing, 36 Pa. 156.

The sole object and meaning of the statute in bringing in the

heirs, is "to enable them to contest the lien or disprove the debt." They alone are within the protection of the statute or can avail themselves of it. Riland v. Eckert, 23 Pa. 215; Leiper v. Thomson, 60 Pa. 177; Shontz v. Brown, 27 Pa. 123; Murphy's Appeal, 8 Watts & S. 165; Stewart v. Montgomery, 23 Pa. 410; McLaughlin v. McCumber, 36 Pa. 14.

The requirement of notice to widow, heirs, or devisees "is not a statutory requisite of title independent of any interest of the widow and heirs." Leiper v. Thomson, 60 Pa. 177; Stewart v. Montgomery, 23 Pa. 410; and Riland v. Eckert, 23 Pa. 215.

Such sale is not absolutely void, but voidable by them alone, and by no other persons.

A sheriff's sale of decedent's lands without notice to heirs, etc., has every effect of a valid sale, except to devest their interest without their consent—and that consent may be evidenced by matter *in pais*.

Here, the widow was also administratrix, and the sheriff's sale, on the Pugh judgment against her as administratrix, passed her life interest as widow.

Where heirs have taken any benefit under the sale on judgment against the administrator alone, they are concluded. They may elect to affirm the sale, in which case it is valid. Smith v. Warden, 19 Pa. 424; Stroble v. Smith, 8 Watts, 280; Seylar v. Carson, 69 Pa. 81; Pearsoll v. Chapin, 44 Pa. 9.

This is precisely what the widow has done in the case at bar by her purchase from the sheriff's vendee.

A judgment creditor who was present at such sale as a bidder had no standing after the acknowledgment of the sheriff's deed to require a resale of the same land: (1) Because his lien was discharged by the sale; (2) because he is estopped from denying the validity of the sale he might have prevented, but encouraged and participated in. Pry's Appeal, 8 Watts, 253; Clauser's Estate, 1 Watts & S. 208; Benner v. Phillips, 9 Watts & S. 13; Act of February 24, 1834, §§ 20, 35, 36; Purdon's Digest, 530, 531, pl. 113, 114, 120; Everman's Appeal, 67 Pa. 335; Murphy's Appeal, 8 Watts & S. 168; Wilson v. Bigger, 7 Watts & S. 111; Crowell v. Meconkey, 5 Pa. 168; Adlum v. Yard, 1 Rawle, 162, 171, 18 Am. Dec. 608; Stroble v. Smith, 8 Watts, 280; Bidwell v. Pittsburgh, 85 Pa. 412, 27 Am. Rep. 662; McKnight v. Pittsburgh, 91 Pa. 273.

An administrator has an interest in the lands of his intestate.

It is upon this interest that the liens of decedent's debts attach; and a sheriff's sale on a judgment against the administrator alone passes his interest and discharges the liens.

There is a true transmission of title of land to executors and administrators so far as the same may be found necessary to pay debts and legacies. Soles v. Hickman, 29 Pa. 342, 72 Am. Dec. 635; Cairns's Estate, 13 Phila. 350.

What really vests in the heir is a title to the residuum, or in the language of our act of 1834, the "surplusage" of the estate. This is what the law casts upon the heir. It can be nothing else consistently with our system of administration and distribution. Horner v. Hasbrouck, 41 Pa. 169.

So long as debts remain for the payment of which the lands of the decedent might be taken—for so long the title of the heir remains in abeyance and secondary to the paramount title of the administrator.

John McGahren and *Garrick M. Harding,* for appellee, Cunningham.—A creditor who has no judgment against the debtor, at or before his decease, must, in order to make a sale of the real estate valid and effective, obtain a judgment not only against his personal representative, but likewise the widow and heirs. The law in the distribution of decedents' estates subordinates the rights of the widow and heirs to those of creditors.

As an administratrix has no interest in lands a sheriff's sale upon a judgment recovered against her as administratrix cannot devest the liens of judgment creditors regularly recovered in the lifetime of the debtor.

The creditors have no security for a proper distribution of the money realized from such a sale. The real estate goes to the heirs, subject to the payment of debts, and the personal estate to the legal representatives, consequently the sureties in an administration bond are not liable for the real estate. M'Coy v. Scott, 2 Rawle, 222, 19 Am. Dec. 640.

The levy made upon an execution issued on a judgment where this had not been done was set aside by the court in Atherton v. Atherton, 2 Pa. St. 112.

A purchaser takes no estate where this rule has been disregarded. Sample v. Barr, 25 Pa. 459; McCracken v. Roberts, 19 Pa. 395.

The sale in the orphans' court, being at John Mangan's in-

stance and for his benefit, must be presumed to have taken place with his consent; and he is estopped from saying that he did not elect to treat the execution sale on the Pugh judgment as void and ineffective. Simmonds's Estate, 19 Pa. 441.

Riland v. Eckert, 23 Pa. 215, decides that a stranger cannot assail the validity of a title acquired by a sale on a judgment against the administratrix alone, with whom the heirs are not joined.

The legal definition of stranger is a person who is not privy to an act or contract. Bouvier, Law Dict.

A judgment lien creditor of an estate is not a stranger to it in the legal sense of the term.

OPINION BY MR. JUSTICE GREEN:

We are quite clear that this case was correctly decided by the learned court below. The plain words of the act of 1834 prohibit either the levy or the payment of the decedent's debt out of the real estate of the widow and heirs, unless they have been brought in by proper notice.

In construing this act we held in McCracken v. Roberts, 19 Pa. 390, that a sheriff's sale of the real estate of a deceased person on a judgment obtained against the administrators of his estate, to which his children were not made parties, agreeably to the provisions of § 34 of the act of February 24, 1834, does not devest the title of the children. BLACK, Ch. J., said, p. 395: "It is admitted by the counsel for the plaintiff in error that the sheriff's deed to Murdoch gave him no title whatever. The want of a scire facias against the devisees was fatal."

The necessity of proceeding against the widow and heirs by scire facias after judgment against the administrator was fully pointed out in the elaborate opinion of KENNEDY, J., in Murphy's Appeal, 8 Watts & S. 165, and confirmed in Atherton v. Atherton, 2 Pa. St. 112.

In Sample v. Barr, 25 Pa. 457, we held that § 34 of the act of 1834 is a rule of action, and not of lien, that the debt must be established against the widow and heirs or devisees before it is levied on the real estate of the decedent, and that a sale without a compliance with the act in this respect will confer no title on the purchaser. Against these decisions it is of no avail to cite cases in which heirs, who have assented to, or participated in, or accepted the results of, a sale of their real estate

made upon a judgment against the administrator only, are held to be estopped from questioning the validity of the sale afterwards. All those cases depend upon their special circumstances of estoppel. There was nothing of that kind in this case. The assent of the widow to the sale under the judgment against herself as administratrix, by means of which she procured a conveyance of the title to herself, most certainly could not devest the estate of the heirs.

Riland v. Eckert, 23 Pa. 215, is of no assistance to the appellant, because in that case the original judgment was obtained against the decedent in his lifetime; and the act of 1834 did not apply.

But WOODWARD, J., in delivering the opinion, fully recognized the cases above cited and said, speaking of the act of 1834: "It has not been applied to judgments obtained in the lifetime of the decedent, for they were not within the mischief; but wherever a title, derived through a judgment against the personal representatives, has been set up to defeat the heirs or devisees of a decedent, it has been required to conform to the statutory rule. Such were Keenan v. Gibson, 9 Pa. 249, and McCracken v. Roberts, 19 Pa. 393, and other cases, which rule that a sheriff's sale on such a judgment, where the widow and heirs or devisees have not been made parties, does not devest their title."

It is argued that the appellee in this case being only a creditor of the decedent, and not an heir, must be regarded as a stranger and therefore not in a position to invoke the benefit of the act of 1834. We cannot assent to that view. Creditors of decedents are not strangers to their estates, but have by law a right to intervene and require the estates to be sold even where the widow and heirs or representatives refuse to do so. Their claims to their debtor's estates are indeed superior to those of the widow and heirs. But in point of fact the party proceeding for the order of sale in this case is John Mangan, a son and heir of the decedent; and hence the contention has nothing to stand upon.

Decree affirmed.

Henry R. Mosser et al., Trading as Mosser & Sadler, Plffs. in Err., v. William M. Donaldson.

A landowner and a builder entered into a written contract for the erection of a building on the former's land, wherein it was provided that "the party of the second part (the builder) shall keep the said building at all times fully insured against fire, for the benefit of whom it may concern; and in case of loss the indemnity shall be divided between the parties hereto, according to their respective interests in the property destroyed." The builder insured the building accordingly. Plaintiffs furnished the builder material upon the credit of the building. A loss having occurred, the insurance money was paid to the landowner (the policy having been assigned to him by the builder), and the plaintiffs sued him for so much thereof as would satisfy their claim. *Held*, that the expression, "for the benefit of whom it may concern," applied only to the parties to the contract; and there being no evidence that the insurance was to be for the plaintiffs' benefit, or evidence of a subsequent promise to pay them therefrom, their action was not maintainable.

(Argued May 31, 1887. Decided October 3, 1887.)

May Term, 1887, No. 18, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment of compulsory nonsuit in an action of assumpsit. Affirmed.

In addition to the facts appearing in the opinions, it may be stated that Null, the builder, in accordance with the terms of the contract set out in the opinions, on March 15, 1885, insured the building in his own name in the sum of $4,000, against loss from any fire which might occur before March 15 then next ensuing. A fire did occur on February 16, 1886, resulting in a total loss; and soon afterwards Null assigned the policy to Donaldson, the owner of the building. Shortly after that, in March, 1886, $3,690, the full amount of the policy, with 1 per cent off for prompt payment, was paid to Donaldson. He refused to pay the claim of the plaintiffs, admitted to be $955.84, or any part of it; hence this suit.

On the trial the plaintiffs offered to prove by H. R. Mosser, one of the plaintiffs:

"That during the time the lumber in suit was being furnished for the defendant's house, witness had two or more interviews

with the defendant, at which he expressed himself dissatisfied with the fact that Null had paid only $300 on the lumber, and requested witness to keep him informed of the delivery of materials, and payments therefor from time to time, which the witness did; and the defendant promised to let the witness know when he, the defendant, would make the next payment to Null, and did let him know accordingly, at which time the defendant paid Null $1,000 and insisted that Null should out of this pay the witness (plaintiff) $700; and he gave as a reason for this that he was liable to have a mechanics' lien against his house for whatever remained unpaid, which he did not want, and would not have, and that he would look out for that. This for the purpose of showing the defendant's admitted liability for the price of the lumber, so far as not paid for by Null, and to show legal grounds for an implied promise to pay for the same."

This offer the court rejected, and gave the plaintiffs an exception. (First assignment of error.)

The plaintiffs further offered to prove: "That the building in question having been insured for $4,000, in pursuance of the contract with Donaldson, the plaintiffs were thereby deprived of the power to insure, or otherwise they might have been able to secure themselves; and this for the purpose of showing a privity between the plaintiffs and the defendant, and also to lay legal grounds for an implied assumpsit."

This offer the court also rejected, and gave plaintiffs an exception. (Second assignment of error.)

The plaintiffs rested; and thereupon, on motion of defendant's counsel, the court ordered a compulsory nonsuit, with leave to the plaintiffs to move to take it off. The same day a motion to take off the nonsuit was filed by plaintiffs, with reasons. This motion was subsequently overruled, and this writ was taken by the plaintiffs, specifying the above assignments of error; and (3) that the court erred in entering the compulsory nonsuit; and (4) that the court erred in refusing to take off the compulsory nonsuit.

The opinion of the court below, on entry of nonsuit, was as follows:

This action is brought by Messrs. Mosser & Sadler against the defendant, to recover certain money which the plaintiffs declare the defendant has in his hands, under a promise, expressed or

implied, to devote a portion of it to their claim. The facts which are not disputed are briefly these: Mr. Null made a contract with Mr. Donaldson to erect a building for him. That contract was in writing, and contains this clause:

"The said party of the second part shall keep the said building at all times fully insured against fire for the benefit of whom it may concern; and in case of loss the indemnity shall be divided between the parties hereto, according to their respective interests in the property destroyed."

Subsequently Mr. Null ordered a good deal of material for this building from the plaintiffs, and that material was furnished upon the credit of the building. For the property thus furnished the plaintiffs had an undoubted right to file a mechanics' lien. Whether or not they also had a right to maintain an action against Mr. Donaldson, and to hold him personally responsible for it, is a question which in our judgment does not arise in this action, which is not brought to enforce his personal responsibility for the property furnished. It is expressly brought, and has been expressly so stated, to recover the insurance money received by the defendant—money which is said to be impressed with a trust in favor of the plaintiffs. It is manifest, therefore, that the case turns upon the construction of the contract, and really upon the construction of the clause quoted.

As we construe that clause, it gives no such right to the plaintiffs as is claimed. It concerns merely the respective interests of Messrs. Null and Donaldson, and provides what is to be done for the protection of these interests alone; and as there is no evidence, either in the contract or outside of it, that this insurance was to be for the benefit of the plaintiffs, and no evidence of any subsequent promise to apply the money in whole or in part to pay the plaintiffs for the materials furnished, we think the case has not been made out. We, therefore, enter a compulsory nonsuit; and the plaintiffs have leave to move to take it off.

The opinion, on refusing to take off nonsuit, was as follows:

Upon the trial, the plaintiffs expressly limited their claim to a portion of the money received by the defendant as proceeds of the insurance upon his burned building, and founded it upon the following clause in the building contract between the defendant and Null, the builder:

"The said (Null) shall keep the said building at all times

fully insured against fire, for the benefit of whom it may concern; and in case of loss, the indemnity shall be divided between the parties hereto, according to their respective interest in the property destroyed."

They claimed to be included in the phrase, "whom it may concern," and, to show that they were concerned, gave evidence sufficient to make out their right to a mechanics' lien. This was enough, if the clause quoted refers to them at all, and therefore, we refused to go into the additional question of the defendant's personal liability for the materials furnished. This suit was not brought to enforce that liability; and since the plaintiffs' interest upon one sufficient ground was already shown it would have been a mere waste of time to show it again upon another.

The controlling question is this: Was the clause quoted above made for the plaintiffs' benefit? If it was, they may sue upon it, although they are not parties to the instrument. Wynn v. Wood, 97 Pa. 216; Dreer v. Pennsylvania Co. for Ins. on Lives & G. A. 108 Pa. 226; Zell's Appeal, 111 Pa. 532, 6 Atl. 107.

We thought upon the trial, however, and still think, that the phrase in dispute refers to Null and Donaldson alone. Their respective interests in the building would vary from time to time, Null's being at first exclusive, and Donaldson's increasing gradually as the building grew, and he made the payments agreed upon.

In our opinion, these were the only interests the parties had in view, for they immediately go on to provide that in case of loss, the indemnity shall be "divided between the parties hereto." This is a plain declaration that the persons "whom it may concern" are "the parties hereto;" and since no provision follows that after division the proceeds are to be held by either, for the benefit of any other person, we see nothing in the agreement on which to base the plaintiffs' claim. There is certainly no express contract to hold the proceeds in trust for the plaintiffs; and the reason for implying a contract to that effect is considerably weakened by the consideration that they could themselves have insured their interest in the building. May, Ins. 93, p. 87; note to Strong v. Manufacturers' Ins. Co. 20 Am. Dec. 512; Stout v. City F. Ins. Co. 12 Iowa, 371, 79 Am. Dec. 539.

They had a direct pecuniary interest which would be damaged by its destruction. Mutual F. Ins. Co. v. Wagner, 1 Sad. Rep. 66.

But aside from this, the defendant was under no duty to protect them from loss; and not having agreed to do so in fact, we think this suit cannot be maintained.

Motion refused. Exception to plaintiffs.

Hall & Jordan, for plaintiffs in error.—The action of assumpsit is one of great comprehensiveness and aptitude; and in many cases the real ground of recovery is not any real or supposed consent of the defendant, but because it was his duty to restore the money to the true owner; and this duty the law will enforce by an action of assumpsit. Reeve, Dom. Rel. 80.

The "action for money had and received can be maintained whenever one man has received or obtained the possession of money of another which *ex æquo et bono* he ought to pay over. There need be no privity between the parties, or promise to pay, other than the implied promise which arises from the facts. When the fact appears that one has money which he ought to pay over the law creates the privity and the promise." Brand v. Williams, 29 Minn. 238, 13 N. W. 42, 4 Rep. 404; Wynn v. Wood, 97 Pa. 216; Thomas v. Cummiskey, 108 Pa. 354.

Donaldson on receipt of this insurance money held it in trust for the plaintiffs, who have the right to recover it in this action of assumpsit; and "although under the evidence there may have been no express contract of indemnity, yet there was its equivalent in the form of an implied contract." Thomas v. Cummiskey, 108 Pa. 354.

"It is a rudimentary principle that a party may sue on a promise made on a sufficient consideration, for his use and benefit, though it be made to another and not himself." Merriman v. Moore, 90 Pa. 78; Justice v. Tallman, 86 Pa. 147; Moody v. Wiley (Ky.) 13 Rep. 13; Emmitt v. Brophy, 42 Ohio St. 82; Bagaley v. Waters, 7 Ohio St. 359, 367; McDowell v. Laev, 35 Wis. 171; Coster v. Albany, 43 N. Y. 399, 411; Hoff's Appeal, 24 Pa. 200, 205; Siter v. Morrs, 13 Pa. 218.

"And he may sue upon such contract without a consideration passing from him to the promisor." Moody v. Wiley (Ky.) 13 Rep. 13, and other cases cited above. See also Litchfield v. Flint, 104 N. Y. 543, 11 N. E. 58, and cases there cited.

James I. Chamberlin and *Wallace DeWitt,* for defendant in error.—As the plaintiffs claim under the phrase "for the ben-

efit of whom it may concern," we say that independently of the limitation to the parties to the agreement the plaintiffs have not so brought themselves within the law, as laid down by this court, as to enable them to share in this fund.

It is not enough for the plaintiffs to show that they have furnished lumber to the house; that they have a right to a mechanics' lien and had filed it; that they had lost by the fire, and that they could not insure their interest in the company which issued the policy to Null.

In De Bolle v. Pennsylvania Ins. Co. 4 Whart. 68, 33 Am. Dec. 38, this court says: "No one can claim the benefit of an insurance made by another for account of whom it may concern, without showing that it was the intention of the person obtaining the insurance to embrace his interest in the goods at the time of the insurance." See also Steele v. Franklin F. Ins. Co. 17 Pa. 298.

The case in hand is essentially different from that of Thomas v. Commiskey, 108 Pa. 354, upon which plaintiffs rely. In that case the insurance policies on their face showed that Thomas & Sons took them to protect their own goods, goods which they held in trust, and goods which they held for customers. And the supreme court says: "We may say *in limine* that the policies covered plaintiff's goods." Thomas & Sons acknowledged that they held the money in trust for the customer, by offering Cummiskey a portion of his loss. The principles controlling the case in hand and the Cummiskey Case have nothing in common.

PER CURIAM:

We concur in the opinion of the court below; hence, affirm this case.

Judgment affirmed.

Commonwealth of Pennsylvania, Plff. in Err., *v.* Philadelphia County.

Since the act of December 12, 1860, the commonwealth cannot recover from a county the sum actually collected by the latter as state tax on per-

NOTE.—For the powers of the board of revenue commissioners, see Lackawanna County v. Com. 156 Pa. 477, 26 Atl. 1119. For the collection of the personal property tax, see Com. v. Philadelphia County, 157 Pa. 531, 550, 558, 27 Atl. 546, 551, 553.

sonal property in excess of the sum fixed by the revenue commissioners as the county's quota of such tax.

If the act of May 24, 1878, § 12, re-enacting the provisions of the act of 1860, is unconstitutional because its provisions are not clearly expressed in the title of the act, the act of 1860 is still in force, as the repeal by the act of 1878 was to take effect so far as the acts repealed were supplied.

As to such tax the general principles which govern the relation between principal and agent do not apply, because the relation between the state and the counties is primarily that of debtor and creditor, being so created by statute.

Whenever, in any year, the revenue commissioners have reduced the aggregate valuation of personal property liable to taxation, as returned by the county, the latter is entitled to the state tax collected upon the excess.

The action of the revenue commissioners upon the valuation of personal property, unappealed from, is final; conclusive alike upon the county and the state.

(Argued May 30, 1887. Decided October 3, 1887.)

May Term, 1887, No. 10, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment for the defendant in an appeal from the settlement of the auditor general and state treasurer. Affirmed.

Reported below, 3 Pa. C. C. Rep. 97.

The facts are stated in the finding of the court below by MCPHERSON, J., which was as follows:

This case was tried without a jury under the act of 1874. We find the facts to be as follows:

1. The returns of aggregate valuation of personal property liable to state tax, made to the board of revenue commissioners by the county of Philadelphia for the years 1877, 1878, 1879, and 1880, have been lost; and there is not sufficient evidence upon which to find the aggregate amounts contained therein.

2. The minutes of the board of revenue commissioners which state the valuations fixed by them do not contain the valuation returned by the county for these years, and except for the year 1878, the evidence does not show whether or not the action of the board reduced the valuations. Even for that year it only shows that the board reduced its own valuation.

3. For the year 1887, the valuation fixed by the board made the state tax due from the defendant $164,780.88. This sum has been paid in full; but for the same year the defendant col-

lected as state tax the sum of $176,084.60, and still retains the excess of $11,303.72.

4. For the year 1878, the valuation fixed by the board, on April 26, 1878, made the state tax due from the defendant $168,693.41. On July 11, 1878, this valuation was reduced by the board so as to make the said tax $161,375.11. This sum has been paid in full; but for the same year the defendant collected as state tax the sum of $181,191.36, and still retains the excess of $19,816.25.

5. For the year 1879 the valuation fixed, on July 11, 1878, remained unchanged, and the defendant paid in full the tax due thereon, *viz.*, $161,375.11; but for the same year it collected as state tax the sum of $172,907.93, and still retains the excess of $11,532.82.

6. For the year 1880 the valuation fixed by the board made the state tax due from the defendant $214,314.97. This sum has been paid in full; but for the same year the defendant collected as state tax the sum of $218,722.13, and still retains the excess of $4,407.16

The conclusions of law announced by the court below were as follows:

The commonwealth claims to recover these several items of excess, aggregating $47,059.95, and the desirability of putting the dispute to rest has led us to consider some of the positions taken in argument, although, in strictness, the facts do not sufficiently appear. The question to be decided is this: Has the commonwealth a right to recover from the county the sum actually collected by the latter as a state tax on personal property, in excess of the sum fixed by the revenue commissioners as the county's quota of such tax? The commonwealth asserts that the county is to be regarded as a mere agent for collection, and cannot, therefore, successfully deny the right of the state to demand whatever amount the tax may have brought into the county's hands, but we do not think the assertion is borne out by the legislation on this subject; and, therefore, we do not agree with the commonwealth's conclusion. In our opinion the state has no valid claim to the money in suit; and we believe a short examination of the statutes will show this view to be sound.

The general principles which govern the relation between principal and agent, and to which the commonwealth appeals, do

not apply, because the relation between the state and the counties, so far as this tax is concerned, is primarily that of creditor and debtor, so created by statute; and, therefore, the question before us depends in large measure simply on the language of the several acts. If anyone is curious about the earlier legislation on this matter, he will find a few examples in:

Acts of March 27, 1782, 2 Dall. L. 4; March 24, 1786, 2 Dall. L. 438; April 17, 1795, 3 Dall. L. 726; March 25, 1831, P. L. 206 and 211; May 3, 1832, P. L. 417; June 11, 1840, P. L. 612, and § 8 of the act of July 27, 1842, P. L. 444.

From these examples the fact appears, as was indeed to be expected, that the state has dealt with the counties on different principles at different times, now requiring them to pay definite sums or quotas, and again calling for such sums only as they might be able to collect. No doubt that course was adopted which seemed on the whole to be best for the particular occasion; and these illustrations are merely given to support the statement that the question before us is not to be decided so much by abstract reasoning as by the language of the statutes themselves.

In 1844 a new tax law was passed. P. L. 497, *et seq.* By § 36 a board of revenue commissioners was created for equalizing the assessments and taxes, for the use of the commonwealth in the different counties thereof; and by § 38 their duties were defined. They were to ascertain and determine the fair and just value of the property in the city of Philadelphia and the several counties of the commonwealth, made taxable by law, adjusting and equalizing the same as far as possible, so as to make all taxes bear as equally as practicable upon all the property in the commonwealth, in proportion to its actual value; and, after this was done, the valuation thus made was to be and remain as the valuation of the said property till the next meeting of the board.

But, since valuations were to be adjusted and equalized, it was implied that they might be changed; and the question at once arises, What would be the effect of such change? These valuations were originally the work of the local assessors, and came to the board from the several county commissioners in the aggregate, stating only lump sums, and not giving detailed lists of the individual owners and the property valued. The lists remained in the county offices, and with them the revenue commissioners had nothing directly to do. Nevertheless, any change made by the board in the lump sums, upon which alone they were to act,

would indirectly affect the lists of individual owners, for the action of the board in fixing the valuation was to be final, and a copy of its adjustment was to be sent to each county, the commissioners whereof were required to "assess and collect the 'state tax . . . on the amount of the valuation so transmitted.'"

Of course, if the revenue commissioners made no change in the valuation they received, the county commissioners would make none in the individual lists; but in case the board did make a change, what then was to be done with the lists? Section 39 answers this question whenever the change was to increase the valuation in any county, for it expressly directs that the valuations on the individual lists shall then be increased by the proper fraction; but we have found no express answer in this statute, if the change was to decrease the valuation. So far, however, as the commonwealth is concerned, we think other provisions of the act plainly imply that the state, by decreasing the valuation, gave up all claim to tax upon the amount thus taken off. Indeed, the very act of decreasing the valuation would be a surrender of this claim, and a final declaration by its own tribunal that the valuation made by the local authorities was not a fair and just basis for state taxation.

After such a surrender and declaration by the state, upon what ground could it claim the whole sum collected, and thus indirectly set aside in its own favor its own deliberate reduction?

But the implication to which we refer is to be found in § 40. There the relation between the state and the county in regard to this tax is in effect declared to be, not that of principal and agent, but that of creditor and debtor.

The county is made primarily liable for the quota fixed by the revenue commissioners; and it must pay that quota, whether it collects or fails to collect.

This was decided in Schuylkill County v. Com. 36 Pa. 524, and seems to determine the case before us, so far as the act of 1844 is concerned; for, since the state is not directly dealing with the individual taxpayer, but primarily with the county, its claim is, in express language, limited to the quota of the county or the taxes as aforesaid (*i. e.*, by the revenue commissioners) adjusted and assessed; and after such quota has been paid, it would seem to have no further claim. See also New York v. Davenport, 92 N. Y. 604.

What then was to become of any money which might be collected by the county as state taxes upon the amount thus taken off its aggregate valuation by the revenue commissioners? In a complete and logical system of taxation we should not expect to find any such money; we should expect to find a reduction in aggregate valuation, followed by a fractional reduction of the individual lists, just as we find an increase of aggregate valuation, followed by a fractional increase on those lists; but we do not discover in Pennsylvania a complete and logical system, and probably the subject does not admit of that kind of treatment. At all events, it is certain that the abstract reasoner will meet many surprises as he studies the taxing statutes, and must often be content to bear with what is written, without being able to approve or perhaps even to explain. At the point we have reached these remarks may apply.

It seems odd enough that a reduction of aggregate valuation made by the revenue commissioners was not directed to be carried down to the individual lists; but the plain fact is that no such direction appears, and the practical result was that the county commissioners made no reduction which the law did not, in terms, require, and that the county was thus enabled to collect, under the name of state tax, more money than it was obliged to pay out on the same account.

As all state tax went, in the first instance, into the county treasury, the effect was to allow the counties to keep this excess for their own use; and this seems to have been recognized by the state as the true meaning of the law, for with the single exception of Com. v. Herr, 1 Pearson (Pa.) 332, decided 1862, we have been referred to no case for more than forty years in which the state laid claim to the excess thus collected and kept for county use. That case expressly declares the effect of the act of 1844 to have been such as we have described, the learned judge saying: "The act of 1844, constituting the board of revenue commissioners, authorized them to determine the amount 'of state taxes on real and personal property which should be charged against'" each county of the commonwealth.

If less was raised, the difference must be forthwith paid out of any money in the county treasury. If more, it went into the same treasury; and the decision is based entirely on § 17 of the act of 1846 (P. L. 490), which was thought to prescribe a different rule. It would now be necessary to consider this section, if

it was not for the later act of December 12, 1860, P. L. 1861, p. 846.

This important statute does not seem to have been brought to Judge PEARSON's notice, for it is not referred to in any way, although it seems to be directly in point. We quote the act in full: "Whenever the board of revenue commissioners shall, for the purpose of equalizing taxation in the several cities and counties of this commonwealth, reduce the aggregate valuation of property in such city or county, such city or county may proceed to collect the state tax as fixed by law upon the aforesaid aggregate valuation; and there shall be paid into the state treasury for state purposes the quota of such city or county, based upon such reduced valuation; and the tax levied by reason of the excess valuation merely shall be received by such city or county as county tax and for county purposes; and the provisions of this act shall apply and extend to those cities and counties in which the aggregate valuation of property was reduced by the last board of revenue commissioners, and shall take effect upon the state tax levied and collected by such cities and counties for the present year."

This certainly is plain language, and we have no doubt that if its provisions had not escaped attention, the decision in Com. v. Herr would have been against this particular claim of the state. Whatever, therefore, may be the true meaning of § 17 of the act of 1846, since 1861, at least, the county has been entitled to the state tax upon the excess whenever the revenue commissioners reduced the aggregate valuation. We may add, in passing, that, while the act of 1860 was repealed by § 14 of the act of 1878 (P. L. 129), its provisions were re-enacted by § 12 of the same act, so that their effect has been continuous, and has not been impaired by the formal appeal. And if, as was argued for the commonwealth, § 12 is unconstitutional because its provisions are not clearly expressed in the title of the act, the act of 1860 would still be in force, for the repeal was only to take effect so far as the acts repealed were supplied. Thus, in one form or the other, either as a separate act, or as § 12 of the act of 1878, the provisions of the act of 1860 are still in force, and, as we have already intimated, either recognize as lawful the practice then prevailing, or, at least, make the practice lawful for the future. Therefore, as to the excess collected by the defendant as state tax for any year in which the revenue commissioners may

have reduced the aggregate valuation returned by the county, the act of 1860 is a bar to the present claim of the commonwealth.

There may have been, however, certain years for which the board made no reduction, but for which the defendant collected as state tax more than its quota. What is to be said about this? We do not certainly know the explanation of this peculiar state of things; but, in our opinion, the state, at least, has no claim upon the excess.

The valuations of the county authorities were accepted by the board; all the tax due thereon has been paid by the county to the state, and, upon the facts before us, we do not see how we can go behind the board's adjustment. The county's fraud was suggested on the argument; but it was not proved, and of course we cannot presume it. We are asked in effect to revise the action of the board in this collateral way, and to presume, from the mere fact that an excess exists, that the defendant concealed from the revenue commissioners a part of its aggregate valuation, and afterwards fraudulently collected, for its own use, a tax on the part concealed. We prefer, as indeed we are bound, to presume that there is an honest explanation, and it does not seem to us to be far to seek.

It is reasonably certain that this tangle, like several others which have been a source of trouble, is to be traced to the notorious fact that during many years only a small part of the taxable personal property in the state was assessed, and to the effort by the revenue commissioners to adjust a system, framed to reach and act upon all such property, so as to roughly meet the actual and well-known truth. Such an effort could hardly fail to cause perplexities, and its most prominent result has been to furnish occasion for much vexing litigation and dispute. As an illustration, we may say that the minutes of the board show that in July, 1878, reductions were made in the aggregate valuations, as theretofore fixed, of twenty-five counties, including the defendant, no doubt to bring the state tax down to the absurd limit of $500,000, fixed by § 3 of the act of 1878, and that recovery in this suit would naturally be followed by the opening of the remaining twenty-four accounts.

And this would be the mere beginning of confusion, for the principle contended for would allow the commonwealth to go back to 1844 and overhaul the long-settled accounts of every

county in the state. Indeed, a recovery for any year would seem to demand a general readjustment for that period, for, if the sums fixed by the revenue commissioners were fair and just on the facts before them from time to time, their fairness and justice would be disturbed by recovering now from any one county more than the quota thus allotted, and a general revision would be imperatively called for.

See the case of Com. v. Philadelphia, 14 W. N. C. 371, where an attempt was unsuccessfully made to change the valuation of one county alone, leaving the others untouched.

Further, it seems to us that the purpose of the commonwealth, to require from the counties only the amount of tax fixed by the revenue commissioners, is clearly shown by taking, in one view, § 40 of the act of 1844 and the act of 1860. In effect, the act of 1844 says to the county: The state will take no less from you than the quota fixed by the board; and the act of 1860 says: The state will take no more than that sum.

It is true that the act of 1860 only covers, by its letter, the case of a reduced valuation, because it seems to have been assumed that if the valuation was not reduced, there could be no excess of tax beyond the quota fixed by the board; but the spirit of the two acts is, as we think, that only that quota was, in any case, to be paid by the county to the state. In other words, and laying aside the case of fraudulent returns, the action of the revenue commissioners upon the valuations of personal property, unappealed from, is final, conclusive alike upon the county and the state. Com. v. Butler County, 2 Pearson (Pa.) 421.

Either in letter or in spirit, therefore, the legislation referred to forbids a recovery in this case by the commonwealth; and we accordingly direct the prothonotary to enter judgment for the defendant, if exceptions are not filed, as provided by law.

The commonwealth filed seventeen exceptions which, in so far as they are material, are set forth in the assignments of error.

Upon overruling the exceptions, McPherson, J., delivered the following opinion:

The first exception is not sustained. The evidence offered stated a different cause of action from that upon which the statement was founded. The commonwealth's claim was simply to recover the excess of state tax collected by the county beyond the quota fixed by the revenue commissioners, and is based upon

the actual receipt of such excess, while the evidence offered was meant to show that the county's return was incorrect, and, therefore, that the commissioners ought to have fixed the quota at a larger sum. In other words, the commonwealth desired to attack collaterally the action of its own tribunal. This, we think, cannot be done in the case before us. The commissioners have ample power under §§ 2 and 3 of the act of 1876, P. L. 126, to inquire into the correctness of any return; and they are the proper tribunal to decide that question. Having decided, and subject to the right of appeal by the county, that action is conclusive alike upon the county and the state; at least in the absence of fraud, a question upon which we do not now pass. The eleventh, twelfth, fourteenth, and fifteenth exceptions involve the same question as the first.

The second, third, fourth, fifth, and sixth exceptions refer to the first and second findings of fact, and are also overruled. The county's returns were not in evidence; and, considering the power of the revenue commissioners to make changes therein, and its actual exercise, we do not think it follows that the amount fixed by the commissioners is the same as that returned by the county. As we believe, there is no such presumption of fact, for the sufficient reason that no such uniform course of dealing on the part of the commissioners is shown as would support the presumption. Nor were the alleged facts admitted by the county; but, on the contrary, some of them, at least, were expressly denied upon the argument.

The tenth and thirteenth exceptions refer to a question not raised by the evidence.

As to the sixteenth, it is enough to say that the decision is not based in any degree upon the matter supposed, which is merely put forward as a statement of certain difficulties in plain view, if the commonwealth's claim were sustained, and, therefore, as an argument from inconvenience against the soundness of its position. The decision would have been the same if no other county than Philadelphia had been likely to be affected.

The seventh, eighth, ninth, and seventeenth exceptions question the conclusions of law, and need no further discussion than is contained in the former opinion.

The exceptions are overruled, and judgment is directed to be entered in accordance with the opinion previously filed.

The assignments of error were as follows:

I. The court below erred in excluding evidence showing that the returns made by the county of Philadelphia of taxable property for the years 1877 to 1880, inclusive, were, and each of them was, grossly below the actual assessments; also, in dismissing the first exception to the decision, being in the words of this assignment.

II. The court below erred in deciding as set forth in exception 2 to the finding, and in dismissing said exception, which was as follows:

"2. The learned court erred in deciding that there was not sufficient evidence upon which to find the aggregate amounts contained in the returns of aggregate valuations of personal property liable to state tax, made to the board of revenue commissioners by the county of Philadelphia for the years 1877, 1878, 1879, and 1880."

III. The court below erred in deciding as set forth in exception 3 to the finding, and in dismissing said exception, which was as follows:

"3. The learned court erred in deciding that the minutes of the board of revenue commissioners, which state the valuations fixed by them, do not contain the valuations returned by the county for these years."

IV. The court erred in deciding as set forth in exception 4 to the finding, and in dismissing said exception, which was as follows:

"4. The learned court erred in not deciding that the said valuations returned by the county of Philadelphia for said years were as follows: For 1877, $164,780.88; for 1878, $168,693.41; for 1879, $168,693.41; for 1880, $214,314.97."

V. The court erred in not deciding as set forth in exception 5 to the finding, and in dismissing said exception, which was as follows:

"5. The learned court erred in not so deciding, particularly in view of the absence of evidence given or offered to show any reduction or change by the board of revenue commissioners from the amounts returned (except the changes found by the court); and in the absence of evidence of action, the presumption is that none was taken."

VI. The court erred in not deciding as set forth in exception 6

to the finding, and in dismissing said exception, which was as follows:

"6. The learned court erred in not so deciding, in view of the fact that the sums mentioned in the fourth exception appear in part in the specifications of appeal, were referred to in argument by counsel on both sides, and were substantially admitted and treated as correct by counsel on both sides."

VII. The court erred in not deciding as set forth in exception 7 to the finding, and in dismissing said exception, which was as follows:

"7. The learned court erred in deciding that the general principles which govern the relations between principal and agent, and to which the commonwealth appeals, do not apply to this case, because the relation between the state and the counties, so far as this tax is concerned, is primarily that of debtor and creditor."

VIII. The court erred in not deciding as set forth in exception 8 to the finding, and in dismissing said exception, which was as follows:

"8. The court erred in deciding that the state has no claim on the excess of state taxes collected by the defendant, above the quota assigned by the board of revenue commissioners, where the said board has made no reduction from the valuation of said taxable property as returned by the county, but fixed the amount of said quota at the amount returned."

IX. The court erred in not deciding as set forth in exception 9 to the finding, and in dismissing said exception, which was as follows:

"9. The court erred in deciding that the effect of the acts of 1860 and 1878, giving to the respective counties the amount of the reduction of state taxes made by the board of revenue commissioners, was to give to the counties taxes collected as and for state taxes, when there had been no reduction or remission by the said board."

X. The court below erred in deciding as set forth in exception 10 to the finding, and in dismissing said exception, which was as follows:

"10. The court erred in so deciding with respect to the taxes for those years in which mortgages, etc., were exempt from local taxation."

XI. The court erred in not deciding as set forth in excep-

tion 11 to the finding, and in dismissing said exception, which was as follows:

"11. The court erred in so deciding, where the return on taxable property made by the county was grossly erroneous, incorrect, and so far lower than the actual assessments, as to raise a presumption of fraud."

XII. The court erred in not deciding as set forth in exception 12 to the finding, and in dismissing said exception, which was as follows:

"12. The court erred in deciding that the gross discrepancy between the actual assessments and the return of taxable property made to the board of revenue commissioners is no evidence of fraud, and that fraud was not proved."

XIII. The court erred in not deciding as set forth in exception 13 to the finding, and in dismissing said exception, which was as follows:

"13. The court erred in deciding that the county may assess and collect taxes as and for state taxes, partially on subjects not subject to taxation except for state purposes, and may retain a part thereof beyond the commissions, etc., allowed by law, for its own use."

XIV. The court erred in not deciding as set forth in exception 14 to the finding, and in dismissing said exception, which was as follows:

"14. The court erred in so ruling, where it appeared that the amount fixed by the board of revenue commissioners was based upon grossly incorrect returns."

XV. The court erred in not deciding as set forth in exception 15 to the finding, and in dismissing said exception, which was as follows:

"15. The court erred in deciding that the county could even avail itself of a reduction made by the board of revenue commissioners, where such reduction was based upon a gross, insufficient return, as aforesaid."

XVI. The court erred in not deciding as set forth in exception 16 to the finding, and in dismissing said exception, which was as follows:

"16. The court erred in basing its decision, in part, on the confusion resulting from the opening of accounts in other counties, there being no evidence before the court that any other

county whatsoever had collected any state taxes for which it had failed to account, or had made any false returns of assessments."

XVII. The court erred in not deciding as set forth in exception 17 to the finding, and in dismissing said exception, which was as follows:

"17. The court erred in directing judgment to be entered for the defendant, if exceptions are not filed," etc.

J. Howard Gendell and *W. S. Kirkpatrick,* Atty. Gen., for the commonwealth, plaintiff in error.—The county, in collecting state taxes, acts as agent for the state.

It is conceded that the claim against the several counties is a tax. An assessment is an essential prerequisite to the collection of a tax. Com. v. Philadelphia, 14 W. N. C. 373.

The act of 1844, § 174, provides that "all personal property," etc., "shall be valued and assessed, and subject to taxation for all state and county purposes whatever." Section 34 directs the county commissioners to assess for the use of the commonwealth the tax therein mentioned. The act of 1846 likewise requires the commissioners to assess for the use of the commonwealth. The acts of 1879 and 1881 likewise direct that "mortgages, etc., . . . shall be and are hereby taxable for state purposes." The various acts require an assessment of the state tax on real and personal property. The tax is levied on the property itself, while in the hands of the individual citizen, and not on the county, and is levied for the use of the commonwealth as a state tax. The county assesses, levies, and collects the tax, but not in its own name; it is collected as a state duty. The subjects of taxation are kept distinct; real estate, for instance, is not now taxable for state purposes, while, on the other hand, mortgages, etc., are not taxable for any other than state purposes.

There is, therefore, a radical difference between this case, and a requisition by the government on a subordinate sovereign or a political subdivision of the country.

The state revenue board cannot make a requisition on the county for such sum as is equitable and just. It can only require the payment of sums duly assessed on the private citizen; and the only power the board has is to equalize the rate of assessment in the different counties. It cannot require money to be paid out of general taxes of other funds. Com. v. Philadelphia, 14 W. N. C. 371.

Another element showing that the money was collected on account of the state, and not as the private money of the county, appears in § 40 of the act of 1844, which requires the county treasurer to pay over the same as fast as collected to the state treasurer.

In order to quicken the action of the county officers, the section provides that if the quota of any county be not paid by a time named, the amount remaining unpaid shall be charged against the county, and paid out of any money in the treasury. The effect of this provision is to make the county liable, as principal debtor. Schuylkill County v. Com. 36 Pa. 524.

There is no machinery whatever by which the state can deal directly with its taxpayers; it must, of necessity, deal through the county officers; and there is, therefore, greater necessity than usual for holding the agent to a strict performance of the duties, and it is, moreover, necessary that the state be able to count with some degree of certainty on the receipts. But all this does not change the nature of the relationship.

An agent (like a trustee or any other person acting in a fiduciary capacity) can never make a profit through his agency. Story, Agency, §§ 207, 214, 217.

Even if some of the taxes had (as alleged, but not proved) been erroneously assessed, the agent who collected them for the principal could not question the principal's title. Story, Agency, § 217; State v. Tumey, 86 Ind. 559; Woodward v. State, 103 Ind. 127, 2 N. E. 321.

At all events, the liability is fixed by the act of 1846.

The act of 1846, § 17, P. L. 490, expressly provides that any excess over the valuation shall not be exempt from taxation for state purposes, but that the valuation shall be treated as a minimum below which the assessments shall not descend.

In Com. v. Herr, 1 Pearson (Pa.) 328, the county of Lancaster was held liable for the entire collections in excess of the valuation.

This act is not repealed by § 14 of "an act defining the powers and extending the duties of the board of revenue commissioners" approved May 24, 1878, P. L. 129. That act relates exclusively to the duties of the revenue board. Under it, as under the earlier acts, the board cannot add or consider new subjects of taxation or add new property; it can only consider whether the same rate

or proportion of assessment to actual value was applied in each county. Com. v. Philadelphia, 14 W. N. C. 371.

The enactment (if the repealing clause has that effect) that the county may retain for its own use taxes collected for the state in excess, not only of the quota assigned by the revenue board, but also in excess of its own return, and that this would apply to taxes for back years, is not, as required by the Constitution, so clearly expressed by the title that a person reading the title would be put on his guard. It is a claim against the county with which the revenue board had no concern; yet, according to the title, the act merely defined their powers and extended their duties.

In Union Pass. R. Co.'s Appeal, 81* Pa. 91, it was held that in an act, the title to which gave authority to lay additional tracks of railway, authority could not be given to lay tracks on streets not mentioned in the original charter. See also Ruth's Appeal, 10 W. N. C. 498, which seems to go beyond the requirements of this case.

The repeal operates only so far as the act of 1846, § 17, is thereby supplied, *viz.*, as to the taxes for future years in which the board acts, and, so far as § 12 gives to the county the amount of the reduction in valuation, it is a repeal *sub modo* only. In other words, it prevents the recovery from the county of those taxes, which, by § 12, are distinctly given to the county, *viz.*, the taxes on the reduction of the valuations.

While the acts of 1844 and 1846 provide a course to be adopted when the valuations are increased by the revenue commissioner, *viz.*, a proportionate division of the increased tax among the taxpayers, yet no provision is made for a reduction. Unless, therefore, the county officers of their own will reduced all the valuations in their county, the inevitable result is a surplus of state taxes. In view of the fact that the same property was, as a general rule, subject to local taxation, such a reduction might be very inexpedient. Accordingly, the act of December 12, 1860, § 1, P. L. 1861, p. 846, provides that "whenever the board of revenue commissioners shall, for the purpose of equalizing taxation in the several cities and counties of this commonwealth, reduce the aggregate valuation of property in such city or county, such city or county may proceed to collect the state tax, as fixed by law, upon the aforesaid aggregate valuation, and there shall be paid into the state treasury, for state purposes, the quota of

such city or county, based upon such reduced valuation, and the tax levied by reason of the excess valuation merely shall be received by such city or county as county tax and for county purposes."

The act of 1878, § 12, is in substantially the same language. It applies only when the board reduce valuations for the purpose and in the manner mentioned, and to the extent of the reduction in valuation only. It is simply to prevent the injustice of unequal taxation in different counties, by reason of difference in valuations, on the one hand, and of the embarrassment from the absence of provision for carrying the reduction by the revenue board down to the individual taxpayer, on the other hand.

The returns for the years 1877 to 1880 have been lost. The court finds that "there is not sufficient evidence upon which to find the aggregate amounts contained therein."

But the revenue board kept minutes, which, by agreement, were treated as in evidence. Those minutes show a reduction, in 1878, from a definite sum to another definite sum.

We claim the entire collection, less payments. The county sets up as a defense the acts of 1860 and 1878, presenting the county with the tax on the reduction of valuation.

The correctness of the account, as settled, is not disputed by any of the specifications of appeal; and the appellant below is restricted to these specifications. Porter v. Com. 1 Penr. & W. 252; Com. v. Porter, 21 Pa. 385.

So far from this, no reduction for 1877 and 1880 is set up there, and the reduction found by the court is set up for 1878 and 1879, in specifications which directly state the amount of the return. This is conclusive.

There can be no question respecting the form of the remedy. If money collected by the county belongs to the state, the county is a public debtor against whom an account may be settled. Philadelphia v. Com. 52 Pa. 451.

Charles F. Warwick, City Solicitor, and *James W. M. Newlin,* for defendant in error.—This case was tried in the court below under the act of 1874, without a jury. The findings of fact are, therefore, conclusive, and cannot be reviewed in the supreme court. Jamison v. Collins, 83 Pa. 359; Lee v. Keys, 88 Pa. 175; Brown v. Dempsey, 95 Pa. 243; Bradlee v. Whitney, 108 Pa. 366.

The collections in excess of the revenue board's equalization belong to the counties by statute. The act of 1844 was so construed in Com. v. Herr, 1 Pearson (Pa.) 332.

The act of 1846 was therein held to require the excess to be paid to the commonwealth.

The act of December 12, 1860, P. L. 1861, p. 846, gave the excess to the counties.

The act of May 24, 1878, § 14, P. L. 129, not only gives the excess to the counties, but expressly repeals the acts of 1846 and 1860.

The commonwealth's argument, as well as its claim, is based upon the totally erroneous supposition that the county is a collecting agent for the state, and is simply the intermediary between the commonwealth and the individual taxpayer. Such is not the case at all, and never has been, either in this state or any other state in the Union.

These municipalities bear the same relation to the state that the great feudatories bore to the Crown, or which, in the Roman Empire, the provinces stood to the Empire.

In all cases where the commonwealth in collecting taxes on personal property deals directly with the counties and makes them responsible for all deficiencies, the county becomes a principal debtor, and is directly taxed for such a sum of money as the state board may assess to it as its quota for a fixed period, to wit: for the current year, or for a longer period in some states. True the quota is fixed with reference to what the county will probably be able to collect from the taxpayers, but in all the states in which this system is pursued it will be seen that the whole theory of county taxation consists in devising a means whereby the state may rely, with absolute security, upon receiving from each county on or before a fixed day in each year a certain definite sum of money, which the state treasurer may rely upon having as a basis of disbursement. Schuylkill County v. Com. 36 Pa. 534.

In New York v. Davenport, 92 N. Y. 604, it was held that losses from taxes for state purposes assessed in the city of New York, but not collected, were to be borne by the city and not the state, which is entitled to the full amount.

The auditor general and state treasurer have no jurisdiction, under the act of 1811, to ascertain the amount payable for state tax on personal property, by any county of the commonwealth;

and they are bound by the action of the board of revenue commissioners, which board alone has any jurisdiction in the premises. Indeed, the annual settlements of account against counties made by the auditor general and state treasurer are unnecessary, and not warranted by the act of 1811.

When that act was passed the revenue of the state was collected from individuals through the agency of various public officers. The state had no fiscal relations with the counties in their political capacity. The county treasurer and other public officers who were the agents of the state in collecting taxes from individuals were collectors only; they were not liable to the commonwealth for taxes which it was impossible to collect; and, therefore, all deficiencies fell upon the state, and of course the gross collections were payable to the state.

The act of 1811, § 1, specifies the accounts which shall be settled under it: "All accounts between the commonwealth and any person or persons, body politic or corporate, as well those with the officers of the revenue as other persons intrusted with the receipt, or who have or hereafter may become possessed of public money."

Now a county is neither a person nor a body politic or corporate, nor an officer of the revenue. A county is a political organization, is a part of the state itself, created purely for governmental purposes, and until the passage of the act of 1844 was not a taxpayer.

In 1844, the state government being in great financial distress, the act of April 29 of that year was passed, with a view of providing the commonwealth with an increased revenue and to make that revenue, or a part of it, absolutely secure; and that the treasury might count with certainty upon the receipt of specified sums for each year, the act of 1844, P. L. p. 497, gave to the revenue board the power of assessing a lump sum or quota upon each county, and made it obligatory upon the county to pay this sum into the treasury, by July 31 of the current year.

By § 38 of the act of 1844, the assessment of the revenue board became the maximum of state taxation, the act saying that the valuation of the board should be and remain until the next meeting of the board.

Section 17 of the act of April 22, 1846, P. L. p. 486, made the assessment of the revenue board a minimum for state taxation. It was doubtful under the act of 1844 whether any excess

could be collected from the individual taxpayer. This act simply validated the tax on the increase, but did not direct its payment into the state treasury.

The act of 1878 declares that the revenue board's valuation shall show the amount with which each city and county is chargeable until the next meeting of the board.

Taking this provision in connection with § 12 of the act of 1878, which provides that where the revenue board reduces the county's own return the tax on the excess shall belong to the county, we surely have a legislative expression of will that the revenue board's quota shall finally determine what the county shall pay to the state for a given period, and that any excess shall belong to the county.

Section 12, considered in its relation to § 17 of the act of 1846, makes it plain that all that the legislature meant by the act of 1846 was to legalize the collection of the state tax on all assessments above the revenue board's valuation, and not that the excess should be paid into the state treasury; but whichever view is correct it is fatal to the commonwealth, as no portion of this alleged excess appears to have been collected while the act of 1846 was in force. The legislature sends its mandate to the counties to collect and pay into the treasury the quota fixed by the revenue board, and that is the end of the matter as between the state and the counties. The legislature says: If you collect any less, that is your loss, and if you collect any more, it is not the commonwealth's gain.

Even had the act of 1811 given express power to the auditor general to ascertain the amount due for tax on personal property, such power would have been done away with by the acts of 1844 and 1878. These acts by clear implication preclude the advancement of any such contention after the date of their enactment.

When the legislature forms a system of taxation, that system operates to the exclusion of all previous inconsistent methods.

An act imposing a collateral inheritance tax is repealed by a later act imposing taxes for the support of the government, although the latter contains no repealing clause. Fox v. Com. 16 Gratt. 1; Cooley, Taxn. 2d ed. p. 295.

A statute which provides a general scheme for assessing and taxing the property of railroad and telegraph companies as a whole, and for distributing it ratably among the different coun-

ties and their several precincts, townships and districts according to the number of miles of line in each, repeals as to such property a power conferred upon the authorities of a city to make provisions for the assessment of the taxes which they were authorized by other provisions of the city charter to assess and collect. Union P. R. Co. v. Cheyenne, 113 U. S. 516, 28 L. ed. 1098, 5 Sup. Ct. Rep. 601.

No property can be taxed until the law-making power authorizes and requires it to be done; and if it be done in one or in a particular way, that alone can be pursued. It cannot be done in another. Tallman v. Butler County, 12 Iowa, 534; Chicago, R. I. & P. R. Co. v. Davenport, 51 Iowa, 454, 1 N. W. 720.

As the acts relating to the board of revenue commissioners were for the purpose of securing greater equality of taxation, as well as for the security of the taxpayer, they are mandatory, and must be followed.

A provision in a statute providing that no apportionment of values should be made by the auditor until after the equalization by the board of equalization is mandatory and if disobeyed would avoid the tax. All directions given in the statutes concerning the levy and assessment of taxes ought to be substantially followed by courts and officers charged with the duties. They would not be enacted if this were not the intention of the law-making power. State Auditor v. Jackson County, 65 Ala. 142.

All those measures which are intended for the security of the citizen for insuring an equality of taxation, and to enable everyone to know with reasonable certainty for what polls and for what real and personal estate he is taxed, and for what all those who are liable with him are taxed, are conditions precedent; and if they are not observed, he is not legally taxed. Torrey v. Millbury, 21 Pick. 64; Young v. Joslin, 13 R. I. 677; French v. Edwards, 13 Wall. 506, 20 L. ed. 702.

Any affirmative statute is a repeal by implication of a previous affirmative statute, so far as it is contrary thereto, for *leges posteriores priores abrogant.* Com. v. Cromley, 1 Ashm. (Pa.) 181.

A subsequent statute revising the subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, must operate to repeal the former to the extent to which its provisions are revised and supplied. Bartlet v. King, 12 Mass. 545, 7 Am. Dec. 99.

Where an affirmative statute introduces a new law or gives a new right, and it appears to be the intention of the legislature that the new law alone shall be followed, or that a right which previously existed should be merged in the one newly created, the latter statute will act as a repeal of the earlier as implying a negative. Harcourt v. Fox, 1 Shower, 506–520; O'Flaherty v. M'Dowell, 6 H. L. Cas. 142; Wilberforce, Statute Law, 328–330.

The moiety act passed by Congress June 22, 1874, was designed to cover the whole ground of frauds on the revenue in the entry of imported goods at the custom house, embracing the punishment of offenders criminally, as well as indemnity to the government; and therefore it was held to supersede, by implication, the different provisions of §§ 2839 and 2864 of the Revised Statutes, U. S. Comp. Stat. 1901, p. 1904, on the same subject. United States v. Auffmordt, 19 Fed. 893.

Later and more specific statutes as a general rule supersede the former and more general statutes, so far as the new and more specific provisions go. Isham v. Bennington Iron Co. 19 Vt. 230.

Where a statute gives a new power, and at the same time provides the means of executing it, those who claim the power can execute it in no other way. Andover & M. Turnp. Corp. v. Gould, 6 Mass. 40, 4 Am. Dec. 84.

Although a subsequent statute is not repugnant in all its provisions to a prior one, yet if it was fairly intended to prescribe the only rules which should govern, it repeals the prior one. Daviess v. Fairbairn, 3 How. 636, 11 L. ed. 760.

An affirmative statute is a repeal by implication of a prior affirmative statute, so far as it is contrary thereto. Sullivan v. People, 15 Ill. 233.

The grant of authority by the legislature to county commissioners, to create a debt and to provide for the payment of the interest thereon, is an enlargement of the power to assess taxes to meet the demand, and an implied repeal of any conflicting statutory limitations. Com. ex rel. Armstrong v. Allegheny County, 40 Pa. 348.

In case of two statutes relating to the same subject, and not in terms repugnant or inconsistent, if the latter statute is clearly intended to prescribe the only rule which shall govern in the case, this will be construed as repealing the original act. Sacramento v. Bird, 15 Cal. 294.

When a special law, local or restricted in its operation, is positively repugnant to a former general law relating to the same subject-matter, and is not merely affirmative, cumulative or auxiliary, the special law repeals the general by implication to the extent of the repugnancy within the limits to which such special law applies. State, North Hudson County R. Co. Prosecutors, v. Kelly, 34 N. J. L. 75.

On this principle, a statute revising the whole subject-matter of a former law repeals it. Thorpe v. Schooling, 7 Nev. 15.

Although repeals by implication are not favored and are not allowed, save where inconsistency is plain and unavoidable, yet a subsequent statute making a different provision on the same subject is not to be construed as an explanatory act, but an implied repeal of the former, so far as the provisions are incompatible with each other. People *ex rel.* Navano v. Van Nort, 64 Barb. 205.

An amendment of another law may operate as a repeal of the original law, or it may not. If an amendment does not change the original law, but simply adds something to it, the amendatory law does not operate as a repeal of the old law. Where an amendment is made that changes the old law in its substantial provisions it must, by a necessary implication, repeal the old law so far as they are in conflict. And where a new law, whether it be in the form of an amendment or otherwise, covers the whole subject-matter of the former, and is inconsistent with it, and evidently intended to supersede and take the place of it, it repeals the old law by implication. Longlois v. Longlois, 48 Ind. 60.

A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, although it contains no express words to that effect, operates as a repeal of the former. State *ex rel.* Flack v. Rogers, 10 Nev. 319.

A statute is repealed by the enactment of another one repugnant to it, or of one covering the whole subject of the former. United States v. Barr, 4 Sawy. 254, Fed. Cas. No. 14,527.

Without any words of express repeal, a later statute repeals repugnant statutes in an earlier one; and if the later one is evidently intended as a substitute for the earlier one, it will be treated as repealing it as an entirety, although all the provisions of the two may not be repugnant. Excelsior Petroleum Co. v. Embury, 67 Barb. 261.

An amendment operates as a repeal, so far as it is repugnant

to the original act; and if not repugnant in express terms, it still effects a repeal if it covers the whole subject of the amended act and contains new provisions showing that it was meant as a substitute. Breitung v. Lindauer, 37 Mich. 217.

It is said the repeal of the act of 1846 is ineffective, because the title of the act of 1878 does not mention it.

In Com. v. Butler County, 2 Pearson (Pa.) 421, it was contended that this very title was insufficient.

But PEARSON, P. J., who thought the act did not take away the right of trial by jury, said: "There is certainly but one subject contained in this title; and the provisions of the bill are no broader. They may go into some details, and prescribe the mode of enforcing its execution or obtaining relief. The statute we consider strictly constitutional. It is intended to form a system."

The contemporary construction placed by all departments of the state government on the question of its relations with the counties is fatal to the commonwealth's claims.

An act of Pennsylvania of 1715 provided for acknowledgment of deeds before justices of the peace. A practice prevailed to acknowledge them before judges of provincial supreme court. After a lapse of many years, held to be a correct exposition of the statute, although the provincial and state courts had never so ruled in any reported case. M'Keen v. Delancy, 5 Cranch, 32, 3 L. ed. 28.

But the executive branch of the government is bound to give effect to the laws which regulate its duties. And where this necessarily requires a construction of those laws, and such a construction has been acted on for a great number of years under the sanction of the law-making power, it becomes a serious question how far the the judicial can or should interfere. United States v. Lytle, 5 McLean, 17, Fed. Cas. No. 15,652.

Although practical construction cannot be admitted as controlling, it is not to be overlooked, and perhaps should be regarded as decisive in a case of doubt or where the error is not plain. Union Ins. Co. v. Hoge, 21 How. 66, 16 L. ed. 68.

The usage and practice under a statute may be resorted to, in case of doubtful meaning, as a means for ascertaining the intent of the lawmaker. Kernion v. Hills, 1 La. Ann. 419; United States v. Pugh, 99 U. S. 269, 25 L. ed. 323; Edwards v. Darby,

12 Wheat. 210, 6 L. ed. 604; Hahn v. United States, 14 Ct. Cl. 317.

PER CURIAM:

We affirm this case on the opinion of the learned judge of the court below.

Judgment affirmed.

Jacob Thudium, Plff., in Err., *v.* A. C. Yost.

Parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of the written obligation, although it may have the effect of changing the terms of the same; but such evidence must be clear, precise, and indubitable.

In an action by a lessee against his lessor for failure to deliver possession, evidence was offered to show that, pending negotiations between the parties for the lease, plaintiff was fully informed that the lease of the tenant then in possession would not expire until April 1, 1887, and that he could not obtain possession before that time unless he purchased the furniture and the unexpired term, and that defendant would not lease the premises prior to that time except upon that condition; that defendant signed the lease on the understanding that plaintiff had complied with the condition, which, as a matter of fact, he had not done; the tenant having refused to give possession this suit was brought. *Held*, that it was error to withdraw this testimony from the consideration of the jury.

(Argued May 3, 1887. Decided October 3, 1887.)

January Term, 1887, No. 136, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Cumberland County to review a judgment on a verdict for plaintiff in an action of covenant. Reversed.

Plea, covenants performed, etc.

The only assignment of error was based on the answer of the court to plaintiff's first point which was as follows:

The evidence produced by the defendant under the offer to show that plaintiff made fraudulent representations to the defendant, which were relied upon by the defendant, and except for which defendant would not have executed the lease of August 31, 1885, wholly fails to make good the offer under which

it was admitted; and being insufficient in law to avoid the lease or affect the plaintiff's rights thereunder, the court is respectfully asked to strike out all the evidence which was received under said offer, and to instruct the jury to wholly disregard the same.

Ans. This request is granted. We do not think that the evidence was so clear and precise that Thudium was induced by reason of the fraudulent representations of Yost to sign the lease as to justify its submission to you for your consideration in the determination of the rights of the parties to this action.

The evidence which the court in its said answer declared was not sufficient to justify its submission to the jury was as follows:

Jacob Thudium testified:

In the month of June, 1885, in the forenoon, Mr. Zeigler, clerk at Woodward's warehouse (I am well acquainted with him), brought Mr. Yost to my house, and introduced Mr. Yost to me as a landlord in Greencastle. They sat in the room awhile; he told me his business and what he was after. Zeigler said: "He is a landlord from Greencastle; he understands his business well; he wants to rent the Mansion House." I told him that the house could not be rented unless he consulted with Mrs. Wilder, for she had a lease for another year. I stated to the gentleman that I was wrongfully informed as to the lease, and I went to see Mr. Hepburn and asked him whether it was correct.

Mr. Yost and I went over to the Mansion House.

Q. By the Court: This was in June?

A. This was in June: I didn't promise him the house that day; made no arrangements; I said I would consider him along with the rest; there were five or six applicants for the house, provided Mrs. Wilder was willing to quit. Shortly afterwards he came again. Mr. Klink said: "Yost is upstairs with Mrs. Wilder in the parlor," I should go up. They commenced to talk about buying out. I told it there to Mr. Klink, Mrs. Wilder, and Mr. Yost, that I would lease to Mr. Yost when he would make a bargain with Mrs. Wilder to buy her out. Mr. Yost said that could be easily arranged, that he was willing to buy her out.

There was nothing more done that day. Mr. Yost came down stairs and went out, and said he would be back again and try to make arrangements with Mrs. Wilder. He sent for me to

come up stairs. I went to the Mansion House and Mr. Klink told me, and I went up and found Mr. Yost and Mrs. Wilder in the parlor talking about the appraisement. Mr. Klink said that Yost said he offered her $500. I was not present. Klink came down and told me. Mr. Yost came down and I asked him how he made out. He said: "I agreed to buy her out, and gave her $500 under the article of agreement." This is as far as I know. Mr. Yost went home and sometime in the latter part of August or September, I think, he came to the house and said I should go along and see Mrs. Wilder. I went with him and he said he had made the arrangement and that Mr. Landis would make an article between Mrs. Wilder and Mr. Yost as regards buying out the furniture. I said I had nothing to do with that, that I hadn't a dollar's worth of furniture in the house; "you must deal with Mrs. Wilder." Then I went around the hotel, I went back to the kitchen and asked Mrs. Wilder whether it was satisfactory to her, if she was willing to get out. She said "Yes." Mr. Yost then said that when the article is made between him and me, that then Captain Landis would make an article between him and Mrs. Wilder, and then he would pay $500.

Q. By the Court: Did he say so, that when the agreement was made between you and him, then he would make an agreement with Mrs. Wilder?

A. He went to Captain Landis, or promised to go there and make that lease. I asked him then when he would pay the $500. He said as soon as the article was made between Mrs. Wilder and Yost, that Captain Landis had an agreement. Before I went up to sign the lease I asked Mrs. Wilder whether it was all right. She said: "You can lease to him; I am willing to go out; I am tired of it." I asked Mr. Yost in the presence of Mrs. Wilder in the back yard, how much he must give beside the $500, and he said they would leave it to the appraisers; that Mrs. Wilder would fix one appraiser and Mr. Yost the other, and those two would get another, and that they would go through the house and appraise the things. Yost had to pay cash for the goods.

Q. Then you went and made your agreement, did you?

A. Yes, sir.

Q. What did you say to Mr. Yost as the reason why you couldn't give him possession on the first of April?

A. Mrs. Wilder would not give him the house unless he paid the money. She would not give up possession.

Mrs. Elizabeth Wilder testified:

Q. You are the present tenant in the Mansion House?

A. Yes, sir.

Q. Will you please state whether in the summer of 1885 you had an interview with Mr. Yost in reference to the leasing of the Mansion House, and whether or not in his presence and in the presence of Mr. Jacob Thudium you had a conversation about it, and if so, what was said to him about your lease, and what he was to do?

A. He came there and asked me whether I would sell out to him. I told him I would. He had heard Mr. Kreps was there.

Q. Sell out what?

A. My furniture. I said I would. He asked if Mr. Kreps was trying to buy, and I told him he was. He asked me what Mr. Kreps had offered. I told him his bargain was to take the things at the appraisement, and he would give me $100 as a forfeit. He hooted at that and he said, "That is nothing; I will pay you $500." I said, "That is all I want, good security." So he said he would buy me out then. Mr. Thudium was there with him. I said: "Another thing," I said, "I have got the lease of the house for another year." He says, "You have?" I said, "Yes, sir."

Q. Who said?

A. Yost. He says: "You have the lease of the house for another year?" I said, "For another year from the first of April." He says: "You will give up the lease to me?" I says: "Yes, sir; if you buy me out I will give it up."

Q. Was Thudium present when this occurred?

A. Yes, sir. Mr. Thudium says: "Whenever you make it satisfactory with Mrs. Wilder, I will talk to you about the house. I will rent you the house, but there is no use of my talking to you unless you make it satisfactory with her first. I have nothing to say unless you do that." He said: "That is all right; I will make it satisfactory with her, if I just get the lease of the house." After that he never asked me for the lease I had, Mr. Yost didn't.

Q. When was this?

A. I can't just exactly say when it was, but a couple of days after Mr. Kreps was there.

Q. It was in the summer of 1885?

A. Yes, sir.

Q. State whether or not he gave you $500, and what he said about it afterwards, or about the time you spoke to him about putting up $500?

A. They went out I suppose to Captain Landis' office.

Q. When was this?

A. A couple of days after Mr. Kreps was there; I don't suppose more than two days.

Q. When they came back what occurred?

A. When they came back they had an article of agreement made. I told Mr. Yost I wouldn't make any article of agreement until I saw Mr. Hepburn. I would be willing to sell out, but I wouldn't make any arrangement until I saw Mr. Hepburn. He went out and got an article made and asked me to sign it. Captain Landis wanted to know why it was that I wouldn't sign it. I told him that I told Mr. Yost that I wouldn't sign it unless I saw Mr. Hepburn. He said: "I will read it to you." I said it wasn't right; that he had nothing in it about the $500; that he was to pay me $500, as a forfeit. I asked him if he was going to pay it, and he said he wasn't. I said: "Are you going to give security?" He said: "You know me; I am good for $500." I said: "That may be; you may be good for $500, and you may be good for $1,000; but I don't know you." He asked me if I would put my name to that paper. I said, "No." Captain Landis thought it was very strange. I told him I didn't know they were going to make an article; I told him I wouldn't sign unless Mr. Hepburn would see the paper.

Q. Then the matter was not satisfactorily arranged; he didn't buy you out?

A. No, sir.

Alexander Klink testifies:

Q. It is agreed that the time Mr. Kreps was down was on the 29th of August, 1885. State whether you heard any conversation between Mr. Thudium and Mr. Yost as to the leasing of this hotel before the 31st of August, 1885; what it was and where; you are clerk at the Mansion House?

A. Yes, sir; Mr. Yost came down and got off the train sometime in the latter part of August. I met him, I think, at the

hall door and I told him to go up in the parlor. He said he wanted to see Mrs. Wilder and Mr. Thudium and I sent him up. I went over to see Mrs. Wilder and got her to go over into the parlor. Then I came down stairs, and Mr. Thudium was in the office, and I said: "Mr. Yost is up in the parlor." He says: "I telegraphed to him," or something like that; he said he couldn't have left home since the time he telegraphed; he must have come without telegraphing. They got talking there about the lease of the house.

Q. Did you go up with him?

A. Yes, sir; he sat right down near the window next the veranda. Mrs. Wilder was there, Mr. Yost, Mr. Thudium, and myself. They then got to talking about buying Mrs. Wilder out, and about leasing the house. Mr. Thudium then remarked to Mr. Yost: "If you buy Mrs. Wilder out, I will lease you the house." Mrs. Wilder told Yost then that Mr. Kreps was down to see about buying her out, and that he offered to give her $100, as a forfeit. Mr. Yost hooted at the idea and he says: "I will make it $500." Mrs. Wilder says: "That is all right; that is all I want." That is about all the conversation I heard there; I went down stairs.

Q. State whether or not anything was said about the lease?

A. Mrs. Wilder said if he would buy her out she would give him the lease.

Q. Did she say how long it was to run?

A. One year.

Q. To what time?

A. From '86 to '87.

Q. She told him that?

A. Yes, sir. What happened afterwards I don't know. I was called down stairs to the office.

Q. Did you hear anything that occurred in the office between Thudium and Yost?

A. I heard a conversation one day in the bar-room.

Q. Before or after this?

A. That was before. The barkeeper was there and Mr. William Cornman, Mr. Thudium, and Mr. Yost, and myself. Mr. Thudium remarked: "If you buy Mrs. Wilder out, I will lease you the house; make it satisfactory to her." That is all the conversation.

Q. What did Yost say?

A. I don't know what he said, more than that would be all right, or something to that effect; I don't remember exactly.

Cross-examination.

Q. Have you given us all the conversation you can remember?

A. Yes, sir; that is all.

Q. What were they talking about buying out?

A. Buying the furniture of the house.

Q. Mr. Thudium said if Yost would buy the furniture, then he would lease it?

A. Yes, sir.

Q. When Mrs. Wilder said that her lease ran for another year, what did Thudium say?

A. I don't know that he made any reply; I don't remember that he did; he said: "Only so you make it satisfactory with Mrs. Wilder."

Q. Did you hear any further conversation between the parties that day at any time?

A. No, sir; I was called to the office to attend to the business of the office, and I didn't hear anything more between them.

William H. Cornman testified:

Q. State whether you heard the conversation between Mr. Thudium and Mr. Yost?

A. I did; yes, sir.

Q. Who were present?

A. Mr. Klink, Mr. Williamson, Mr. Thudium, Mr. Yost, and myself.

Q. Where was it?

A. It was in the bar-room of the Mansion House.

Q. State what it was as near as you recollect?

A. They were talking in the Mansion House, and I heard Mr. Thudium say to Mr. Yost if he would buy Mrs. Wilder's furniture and make a satisfactory arrangement with her, he would lease him the house. Mr. Yost said he would make everything satisfactory with her.

A. C. Yost, the plaintiff, testified on cross-examination:

Q. Do you know Mr. John Park, in this town, a butcher?

A. Yes, sir; I do.

Q. Did you say to him some time in August, 1885, that you

knew Mrs. Wilder had a lease for that house for another year, and that you would have to buy her out before you could get a lease from Thudium?

A. Not as I remember of.

Q. Do you say you that didn't say so?

A. Please repeat that question.

Q. Did you say to Mr. John Park, in August, 1885, before your lease, that you knew that Mrs. Wilder had a lease on the house for another year, and that you would have to buy her out before you could get a lease from Thudium?

A. Not as I remember of, no, sir.

John Park testified:

Q. You heard the question I just put to Mr. Yost. Just go on and state whether or not any such conversation occurred, and when and where.

A. There was a conversation of that kind occurred between Mr. Yost and me in the Mansion House.

Q. When?

A. It was sometime in August; I don't know whether it was the beginning of August or the latter part of August.

Q. Go on and state what he said.

A. He said he had come to lease the Mansion House, but he had found out that he couldn't get a lease on it unless he could make some arrangement with Mrs. Wilder; that she had a lease for another year on it, and he was going to try to buy her out. I believe they did get together toward the last to make a bargain. That is all the conversation we had at that time. Different times we talked about it.

Q. Anything at any other time to the same effect, or anything like it?

A. No, sir; not exactly.

Other material facts appear in the opinion.

Verdict and judgment for plaintiff.

F. E. Beltzhoover and *Hepburn, Jr., & Stuart,* for plaintiff in error.—Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may change or reform the instrument; but such evidence must be clear, precise, and indubitable. Spen-

cer v. Colt, 89 Pa. 314; Phillips v. Meily, 106 Pa. 536; Thomas v. Loose, 114 Pa. 35, 6 Atl. 326.

A written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking material to the subject-matter of the contract made by one of the parties at the time of the execution of the writing and which induced the other party to put his name to it. Walker v. France, 112 Pa. 203, 5 Atl. 208.

No principle has been better settled by a long line of decisions than that parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of a written obligation, although it may have the effect of varying or changing the terms of a written contract. Brown v. Morange, 108 Pa. 75.

Parol evidence is competent where there has been an attempt to make a fraudulent use of the instrument in violation of a promise or agreement made at the time the instrument was signed and without which it would not have been executed. Phillips v. Meily, 106 Pa. 536.

To materially vary or contradict a written contract by evidence of a contemporaneous parol agreement it must be alleged that the contract was executed on the faith of the parol agreement. Callan v. Lukens, 89 Pa. 134.

Where at the execution of a writing a stipulation has been entered into, a condition annexed, or a promise made by word of mouth, upon the faith of which the writing was executed, parol evidence is admissible, although it may vary and materially change the terms of the contract. Greenawalt v. Kohne, 85 Pa. 369.

To pave the way for the admission of oral declarations to vary a written instrument it is not necessary to prove that a party was actuated by a fraudulent intention at the time of the execution of the writing; for although his original object may have been honest and upright, if to procure an unjust advantage he subsequently denies the parol qualification of the written contract, it is such a fraud as will operate to let in evidence of the real intent and conclusion of the parties to the instrument. Lippincott v. Whitman, 83 Pa. 246.

A verbal promise at the making of a written contract, if made to obtain its execution, may be given in evidence. Graver v. Scott, 80 Pa. 88.

When a promise is made by one in consideration of the execution of a writing by another the promise may be shown by parol evidence. Shughart v. Moore, 78 Pa. 469.

A verbal promise by one of the parties at the making of a written contract, if it was used to obtain the execution of the writing, may be given in evidence. Powelton Coal Co. v. McShain, 75 Pa. 238.

Conversations and negotiations prior and leading to a written contract are evidence to prove a fraud or trust. McGinity v. McGinity, 63 Pa. 38.

The plaintiff in error also desires to advert to the refusal of the court below to permit him to have the conclusion to the jury, under the pleadings in the case. The pleas were covenants performed and covenants performed with leave, which are affirmative pleas. Middleton v. Stone, 111 Pa. 590, 4 Atl. 523, and cases there cited.

The plea of covenants performed with leave is an affirmative plea. Zents v. Legnard, 70 Pa. 192.

Under this plea the affirmative of the issue is thrown upon the defendant and with it the right to conclude to the jury. Norris v. Insurance Co. 3 Yeates, 84, 2 Am. Dec. 360; Richards v. Nixon, 20 Pa. 19; Gebhart v. Francis, 32 Pa. 78; Abbott v. Lyon, 4 Watts & S. 38; Troubat & H. Pr. § 1533. See 4 Rawle, 283.

Landis & Smead, J. M. Weakley, and *John Stewart,* for defendant in error.—To collect or even to classify the cases in which this court has admitted parol evidence as a defense in actions founded on written contracts would be impossible and useless. They are found in almost every report. Many of them are in cases in which it was permitted to prove parol defeasance against a deed absolute on its face. This has been changed by the act of June 8, 1881.

Another class of cases is where the consideration named in the contract has been shown by parol evidence to include something that was not expressed in the written paper, and to prove that the recited consideration had failed. It is also admitted to prove identity of persons, or of property; to correct erroneous dates and to show the truth of the transaction, where from fraud, accident, or mistake the written contract does not disclose it.

These cases all recognize the general rule of the common law, —that a written contract is the best evidence of the agreement between the parties; that it is the consummation of their negotiations; and that it should not be altered or contradicted, except in such cases as a chancellor would feel bound to modify it or set it aside. Pennsylvania R. Co. v. Shay, 82 Pa. 198; Lippincott v. Whitman, 83 Pa. 244; Rowand v. Finney, 96 Pa. 197.

The facts and circumstances relied on must not be of doubtful import. It is not sufficient that they be merely consistent with the instrument's being a mortgage, they must be clearly inconsistent with its being an absolute conveyance. Titles regular and legal on their face cannot be swept away by parol evidence of doubtful facts or ambiguous inferences. Burger v. Dankel, 100 Pa. 118.

The order on which the court permitted the counsel to address the jury is not assignable as error. The supreme court will not reverse the court below for allowing counsel to speak in "wrong order." This was intimated in Marsh v. Pier, 4 Rawle, 284, 26 Am. Dec. 131, and was expressly ruled in Hartman v. Keystone Ins. Co. 21 Pa. 475, and in Smith v. Frazier, 53 Pa. 228.

OPINION BY MR. JUSTICE STERRETT:

It clearly appears from the evidence recited in the specification of error that pending the negotiations, between the parties, for the lease in suit, plaintiff below was fully informed that the lease of the tenant then in possession would not expire until April 1, 1887; that possession of the premises, before that time, could not be obtained by him or anyone else, without buying the furniture and unexpired term of the tenant, and that defendant would not lease the premises for a term commencing April 1, 1886, except on the condition that such purchase was made by the new lessee, and carried out in good faith; that on the condition above stated, and with the distinct understanding that plaintiff below had purchased the furniture and outstanding term of Mrs. Wilder, and made a satisfactory arrangement with her for possession on or before April 1, 1886, defendant was induced to sign the lease in controversy; that while plaintiff below had agreed to buy the furniture and interest of Mrs. Wilder, he had not in fact consummated the purchase, and afterwards refused to carry out, in good faith, his agreement with

her; and for that reason she refused to surrender possession of the premises.

Without referring in detail to the testimony of Thudium himself, Mrs. Wilder, Alexander Klink, and others, upon which defendant below relied, it is sufficient to say that if it had been submitted to the jury, with proper instructions, they would have been warranted in finding a state of facts substantially the same as the foregoing—facts that would have been a complete answer to plaintiff's claim for damages for nondelivery of possession on April 1, 1886.

There is no room for any doubt or difference of opinion as to the kind and degree of proof necessary to sustain a defense such as was interposed in this case. Our books are full of cases on the subject, some of the more recent of which are McGinity v. McGinity, 63 Pa. 38; Powelton Coal Co. v. McShain, 75 Pa. 238; Shughart v. Moore, 78 Pa. 469; Graver v. Scott, 80 Pa. 88; Lippincott v. Whitman, 83 Pa. 244; Greenawalt v. Kohne, 85 Pa. 369; Callan v. Lukens, 89 Pa. 134; Phillips v. Meily, 106 Pa. 536; Spencer v. Colt, 89 Pa. 314; Brown v. Morange, 108 Pa. 69; Walker v. France, 112 Pa. 203, 5 Atl. 208; Thomas v. Loose, 114 Pa. 35, 6 Atl. 326.

In Brown v. Morange, 108 Pa. 69, it is said: "No principle has been better settled by a long line of decisions than that parol evidence is admissible to show a verbal contemporaneous agreement which induced the execution of a written obligation, though it may have the effect of varying or changing the terms of the written contract;" or as the same idea is expressed in Walker v. France, 112 Pa. 203, 5 Atl. 208, "a written agreement may be modified, explained, reformed, or altogether set aside by parol evidence of an oral promise or undertaking, material to the subject-matter of the contract, made by one of the parties at the time of the execution of the writing and which induced the other party to put his name to it."

But, while parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, although it may change or reform the instrument, such evidence in the language of all the cases must be "clear, precise, and indubitable." By these words it is meant, as defined in Spencer v. Colt, 89 Pa. 314, that it shall be found that the witnesses are credible; that they distinctly remember the facts to which they testify; that they narrate the details ex-

actly and that their statements are true. Absolute certainty is out of the question.

The difficulty is not so much in the principles themselves as in their application to particular cases.

An examination of the evidence on which plaintiff in error relies has satisfied us that, if believed by the jury, it was quite sufficient to have warranted a verdict in his favor, and hence the learned judge erred in not submitting it to the jury.

Judgment reversed and a *venire facias de novo* awarded.

James D. Tagg, Plff. in Err., *v.* Thomas A. Behring.

In the absence of evidence of fraud, accident or mistake in the execution of an instrument in writing, the court must instruct the jury to find in accordance with its legal effect.

The insertion of the words "after the above-mentioned notes are fully paid and satisfied, and not before," in the clause of warranty, will not alter the effect of an otherwise absolute bill of sale of chattels.

(Argued June 1, 1887. Decided October 3, 1887.)

May Term, 1887, No. 21, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment on a verdict for the defendant in an action of replevin. Affirmed.

This was an action of replevin for horses, carriages, etc., the contents of a livery stable. The plaintiff gave a bond and the goods were delivered to him.

At the trial before MCPHERSON, J., the plaintiff proved the following bill of sale of the goods replevied:

Know all men by these presents: That I, James D. Tagg, of the city of Harrisburg, county of Dauphin, and state of Penn-

NOTE.—As was said by the court in this case, the mistake was not as to the words included in the instrument, but as to their legal effect. Parol evidence is not admissible in such cases to show what meaning one of the parties gave to the wording, where the law puts a different construction thereon. Cochran v. Pew, 159 Pa. 184, 28 Atl. 219. It has been said that the contrary is true, if the party inducing the mistake seeks to take advantage of it. Meckley's Estate, 20 Pa. 478.

sylvania, for and in consideration of the sum of thirteen hundred ($1,300) dollars, to be paid in manner following, that is to say: Four hundred ($400) dollars cash, money in hand paid, a note for four hundred ($400) dollars, payable in ninety days from the date thereof, and a note for five hundred ($500) dollars payable in one year from the date thereof, given and paid by Thomas A. Behring of the same place, at and before the ensealing and delivery of these presents, the receipt whereof is hereby acknowledged, have bargained, sold, and delivered, and by these same presents do bargain, sell and deliver unto the said Thomas A. Behring, one pair sorrel horses, one gray horse, and one bay mare, two furniture wagons, one excursion wagon, one mannechore wagon, two night wagons, two buggies, one four horse sleigh, and one single horse sleigh, two sets double heavy harness (complete), one set of double light harness (complete), three sets of single harness, one cutting box, one buffalo robe, three fall blankets, three dusters, three horse blankets, four strings of sleigh bells and contents of stable, No. 1117 Montgomery street, said city, belonging to the said party of the first part, in use for livery and hauling business as carried on by said party of the first part (the floor to be repaired on second story; a manure pit to be placed underground in front part of stable by said party of the first part.) To have and to hold the said horses, wagons, sleighs, goods, and other articles unto the said Thomas A. Behring, his executors, administrators, and assigns, to his and their own proper use, benefit, and behoof forever.

And I, the said James D. Tagg, my heirs, executors, and administrators, the bargained premises unto the said Thomas A. Behring, his executors, administrators, and assigns, after the above-mentioned notes are fully paid and satisfied, and not before, from all and against all person and persons whomsoever, shall and will warrant and forever defend by these presents.

In witness whereof, I have hereunto set my hand and seal, the 11th day of March, A. D. 1886.

James D. Tagg (Seal).

Witness: A. J. Fager.

The plaintiff then proved that before this paper was entirely written and before its execution, as the defendant was handing the plaintiff the notes mentioned in the writing, they being simply promissory notes, the plaintiff, referring to the security for

the property he was selling, asked, "What security will I have for the payment of these notes?" The parties then had a conversation as to the security for the notes, and the words, "after the above-mentioned notes are fully paid, and not before," were put in. After finishing the writing, the alderman who wrote it read it to the parties, the plaintiff signed it, and the alderman witnessed it.

Upon the defendant's failure to pay the first note this action was begun. The position of the inserted words in the bill of sale gave rise to a dispute as to their effect, the plaintiff claiming that the title to the articles sold would not pass until after the notes should be fully paid and satisfied. The defendant confined the effect of the words to the warranty of the title.

The court charged the jury as follows:

These parties have put their engagement in writing. [There is evidence by the subscribing witness as to certain conversations between the parties in this suit before this contract was executed, which conversation resulted, as the witness testified, in the addition of the final clause to this contract, namely: "And I, the said James D. Tagg, my heirs, executors, and administrators, the bargained premises unto said Thomas A. Behring, his executors, administrators, and assigns, after the above-mentioned notes are fully paid and satisfied, and not before, from all and against all persons whomsoever, shall and will warrant and forever defend by these presents."]

That upon its face is a mere clause warranting the title at a certain time and in a certain contingency, and upon its face does not prevent the title of this property from passing from Mr. Tagg to Mr. Behring.

[It is urged, however, that the testimony of Mr. Fager and Mr. Tagg will alter the meaning of this clause, and will determine that its true effect was to be that the title should not pass at all until after the notes were paid. To this we say that no such question can arise in this case, for the reason that the uncontradicted testimony also shows that this writing was read over to the parties after it was completed, and before it was signed, and that they assented to its terms. There is, therefore, no ground for the allegation that there was either fraud, accident or mistake in the paper as it stands. At best it was a misunderstanding by the parties of the legal effect of the words

which they both were content to have used; and from that position we cannot relieve them. We therefore instruct you to find a verdict for the defendant.]

Therefore, there will be this question to be submitted to you: How much damage is defendant entitled to recover for the taking and detention of this property? And that we say to you is fixed by the value, and is to be interest on the value of the property from the time it was taken—he is entitled to have back his property; and he is also entitled to have interest upon its value from the time it was taken, as damages for its unlawful taking from him. So you will find a verdict for the defendant, and you will also find that he have as damages so much money—and that you must determine according to the rule we have laid down to you, namely: interest upon the value of the property at the time it was taken.

Now, as to the value, you must determine that as a question of fact. When it was sold the value was placed at $1,300, and you have the testimony as to whether it depreciated in value since that time. You must determine from that the value when it was replevied, the 18th of June, I think, 1886. When you have determined the value at that time, calculate the interest upon it from that day to this, and render a verdict for that interest only as damages to the defendant.

Verdict and judgment were for the defendant.

The assignments of error specified the portions of the charge inclosed in brackets.

Wallace DeWitt, for plaintiff in error.—As the contest is between the parties to the contract the terms of the contract must prevail. Martin v. Mathiot, 14 Serg. & R. 214, 16 Am. Dec. 491; Rose v. Story, 1 Pa. St. 190, 44 Am. Dec. 121; Haak v. Linderman, 64 Pa. 499, 3 Am. Rep. 612; Enlow v. Klein, 79 Pa. 488; Hartley v. Decker, 89 Pa. 470.

And in case the party who seeks to avoid or reform it read the instrument before signing and intelligently signed it, as containing the entire agreement, it can only be overcome by the testimony of two witnesses or of one witness corroborated by circumstances equivalent to another. Thomas v. Loose, 114 Pa. 35, 6 Atl. 326; Phillips v. Meily, 106 Pa. 543; Juniata Bldg. & L. Asso. v. Hetzel, 103 Pa. 507.

Mr. Fager gave his testimony in open court, in the presence and hearing of Tagg and Behring, and is contradicted by neither.

In Chalfant v. Williams, 35 Pa. 212, and Aldridge v. Eshleman, 46 Pa. 425, the testimony of the scrivener or subscribing witness was heard as the only witness as to what took place before and at the execution of the contract, to explain the real meaning and intention of the parties.

In Kostenbader v. Peters, 80 Pa. 438, it was ruled that the fact that the deed was read over to the party signing it did not affect her right to have it reformed, if in point of fact a mistake had been made.

What passes at and before the execution constitutes the "instructions" given to the scrivener, which must be proven by one alleging a mistake by the scrivener. Cozens v. Stevenson, 5 Serg. & R. 425; Hurst v. Kirkbride, cited in 1 Binn. 616; Chalfant v. Williams, 35 Pa. 212.

While the construction of the paper was for the court, yet it was its duty to construe it with reference to the subject-matter and the circumstances of the parties; and these were explainable by parol evidence. Barnhart v. Riddle, 29 Pa. 96.

However clear and indisputable may be the proof when it depends on oral testimony, it is, nevertheless, the province of the jury to decide, under instructions from the court, as to the law applicable to the facts. Reel v. Elder, 62 Pa. 316, 1 Am. Rep. 414.

John W. Young and *J. C. McAlarney* for defendant in error.

PER CURIAM:

As there was nothing in this case that called for its submission to the jury, the court could do nothing else than give a binding instruction to find for the defendant.

Judgment affirmed.

City of Harrisburg's Appeal.

The erection of market houses upon a public street or square is illegal and will be restrained by injunction.

NOTE.—A municipal corporation has standing to ask for an injunction to restrain and prevent unlawful obstructions upon its streets and property. Pittsburgh v. Epping-Carpenter Co. 194 Pa. 318, 45 Atl. 129; Scranton v.

Although a dedication of land to public use may be by parol as well as by deed, the questions whether the dedication has really been made and for what purpose it has been made are always questions of fact and of intention to be inferred from facts.

The promise of the founder of Harrisburg to execute a deed dedicating land for streets, and his execution of such a deed before executing deeds for abutting lots, rendered such dedication effectual as against claims that the same land had previously been dedicated for a market by the verbal sale of abutting lots.

(Argued May 31, 1887. Decided October 3, 1887.)

May Term, 1887, No. 11, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Appeal from a decree of the Common Pleas of Dauphin County sustaining exceptions to a master's report and making perpetual an injunction. Affirmed.

This was a bill in equity filed by the commonwealth of Pennsylvania *ex rel.* the attorney general, and John J. Shoemaker and others, citizens and taxpayers residing and owning property upon a portion of Second street, Harrisburg, known as Market square, against the city of Harrisburg for an injunction to restrain the city from erecting in Market square market houses occupying more ground than those already there. A preliminary injunction was granted. Upon the coming in of the city's answer the cause was referred to C. H. Bergner, Esq., as examiner and master, who found the facts as stated in the opinion of the court below, and recommended a decree dissolving the injunction, and dismissing the bill, at the cost of the complainants.

Scranton Steel Co. 154 Pa. 171, 26 Atl. 1; Philadelphia v. Friday, 6 Phila. 275. And no custom or usage can validate it. McNerney v. Reading City, 150 Pa. 611, 25 Atl. 57. See also note to Butler's Appeal, 1 Sad. Rep. 219.

See also the following editorial notes presenting the authorities on their respective subjects: Prescriptive right to obstruct highway, note to Leahan v. Cochrane, 53 L. R. A. 891; obstructions authorized, note to Spencer v. Andrew, 12 L. R. A. 115; liability of municipal corporations for permitting, note to Cairncross v. Pewaukee, 10 L. R. A. 473; right of abutting owner to place building materials in street, note to Raymond v. Kiseberg, 19 L. R. A. 643; obstruction of street or sidewalk for business or building purposes, note to Flynn v. Taylor, 14 L. R. A. 556; liability of railroad company for obstructing highway crossing, note to Sellick v. Lake Shore & M. S. R. Co. 18 L. R. A. 154; injunction by municipality against nuisances upon, note to Drew v. Geneva, 42 L. R. A. 814; right to maintain awnings in street, note to Augusta v. Burum, 26 L. R. A. 340.

Upon sustaining exceptions to the report and entering a decree continuing and making perpetual the injunction already granted, SIMONTON, P. J., delivered the following opinion:

The commonwealth of Pennsylvania, and certain citizens of Harrisburg, owners of real estate fronting on Market square in said city, seek by the bill filed in this case to obtain an injunction restraining the authorities of the city from erecting new and enlarged market houses in said square.

It is alleged in the bill, as the fundamental reason why the injunction should be granted, that the site of the proposed new buildings is a part of Second street in said city, and that therefore they would be, if erected, an unlawful obstruction to said street. The respondents admit that they intend to erect the buildings, but deny that the proposed site is a part of Second street; and the issue presented by this allegation and denial is the chief question in the case.

The cause was referred to an examiner and master, who took much testimony and made an able and exhaustive report, finding the facts very fully, discussing the law of the case thoroughly, and arriving at the conclusion that Second street does not extend through Market square, and, consequently, that the proposed site of the new market houses is no part of said street; and, therefore, recommending a decree dismissing the bill. The case comes before us upon exceptions filed to this report.

It appears, from the findings of the master and the documents in evidence, that on March 3, 1784, the founder of Harrisburg, John Harris, made a public proposal, in writing, to establish a town on the Susquehanna river, near Harris ferry, and agreed that the general assembly should appoint commissioners to lay out the streets, lanes, and alleys, which he agreed thereupon to convey to the public, and to fix a valuation upon the lots, at which they could be taken, in fee simple or on ground rent, by those who might apply for them.

Commissioners were, accordingly, appointed, who laid out the streets, lanes, and alleys, and appraised the lots, and made a written report or certificate of their doings April 14, 1785. In this they stated that "the said town, with respect to the size of the lots, disposition of the streets, lanes, and alleys, and the choice of the public grounds, was laid out under our direction and inspection, agreeably to the adjoining plan of the said town." The "plan" thus referred to was not placed on record,

and was, within a few years thereafter, lost, to the public at least. There can be no reasonable doubt, however, that it had laid down upon it the space known as Market square; but how it was designated is not certain. Nine of the lots fronting on this square were allotted, in fee simple, or on ground rent with reference to this plan, prior to July 6, 1785; but none of them were conveyed, nor so far as appears was there any written contract to convey any of them until after that date.

On July 6, 1785, John Harris and wife conveyed by deed to said commissioners, in trust, for public use forever, all the streets, lanes, and alleys so laid out. This deed recites, among other things, that John Harris had agreed with said commissioners that he would lay out said town with such streets, lanes, and alleys as they should direct, and that he would confirm such streets, lanes, and alleys for public use forever; that they had been so laid out, and therefore, in consideration of the premises and of five shillings, said Harris and wife bargained and sold to said commissioners, in trust as aforesaid, "all the streets, lanes, alleys, or highways, as laid out by the commissioners, . . . the butts, boundaries, courses, and distances, lengths, and breadths whereof are as follows,—to wit:" Giving first the courses and length of Front street, in degrees and minutes, and in perches, and next "Second street, beginning at the upper end of said town on William McClay's line, at a post marked for a corner, thence extending south 45 degrees, east 63 perches to a corner, thence south 53 degrees, east 189 perches to the end thereof, the breadth whereof is 80 feet from the upper to the lower end aforesaid." Then follows a description of "Market street, beginning in the line of Front street, thence extending at right angles with the same, north 36 degrees and a half, east 85 perches to the end thereof, and one side of the said town, the breadth whereof is 80 feet from the beginning at Front street or the river, to the end aforesaid." Then follows the further description: "Third street, Pine street, Locust street, Walnut street, Chestnut street, and Mulberry street, and each and every of them are 52 feet and ½ foot wide, to extend from the one end or side of the said town to the other. River alley, Raspberry alley, —— alley, Barberry alley, Cranberry alley, Strawberry alley, Blackberry alley, and Cherry alley, and each and all and every of them, are 20 feet wide, and extend from one end or side of the said town to the other end of the same, the situation,

length, and extent of which streets, lanes, and alleys will fully appear in the draught executed by the commissioners, and recorded at Harrisburg, in book A, vol. 1, pp. 76, 77." This "draught," as we have already stated, was not, in fact, recorded.

Evidence was taken on both sides; and the question was much discussed, on the argument of the exceptions, whether Second street could now be located, on the ground, from the description in this deed alone, without recourse to the "draught" therein referred to. All this we consider of no consequence whatever, for the reason that there can be no doubt that it could have been so located at the time the deed was made. The deed calls for "a post for a corner, on William McClay's line." This post was doubtless there; and with it for a starting point, the deed furnished all the data necessary to lay out the street, upon the ground. Neither is there any question as to where it was actually laid. There is no suggestion anywhere that the building line on Second street, on either side, has ever been changed.

It is, therefore, certain that Second street, as described in this deed, if extended from its beginning to its end, according to the courses and distances there given, would pass through Market square, and include the site of the proposed new market houses. Furthermore, the master finds that the plan made by Thomas Forster, pursuant to ordinance of council of June 24, 1796, contains a correct representation of that part of the town of Harrisburg laid out by Harris and the commissioners, and this also shows that Second street, if it extends from its beginning to its end, as described in the deed, passes through Market square, and includes the proposed site of the buildings. There is, therefore, no real controversy as to the location of Second street. The only question is whether this street does really extend continuously the distance of 189 perches, as described in the deed, or whether this (from the description) apparently unbroken progression is interrupted by the northwest, and revived at the southeast, exterior line of Market square.

It is contended on behalf of respondents that the acts done by Harris, prior to the execution of the deed of the streets to the commissioners, including his proposal to the public, his acceptance of the work of the commissioners in laying out the streets, lanes and alleys, and his allotment and sale of lots with reference to their plan, effected a dedication of the streets, lanes and alleys, and of Market square, to the public, prior to the date

of the deed of July 6, 1785, conveying the streets, lanes, and alleys, and that the execution of this deed did not add to the completeness, and could not change the nature of the dedication, and that, therefore, Second street cannot extend through Market square. This argument assumes that, on the commissioners' plan, Second street was not laid down as extending through the square, and that this square was so designated on the plan that this designation, coupled with the fact that Harris made verbal contracts for the sale of lots as numbered upon the plan and received part of the purchase money before he executed the deed for the streets, passed the title to the square by dedication for market purposes so effectually that there remained no title in him to any part of the square nor any right to convey any part of it as a street.

We do not think it is possible now to determine with certainty how Market square was designated on the commissioners' plan. The evidence given by the city engineer, who examined all the deeds on record given by John Harris for lots fronting on the square, shows that in some of them it is described as Market square, in others as Second street, in others as Market square or Second street, in others as Market place, and in others Market space—while they all refer to the commissioners' plan. It must also be remembered that the deed of July 6, 1785, to the commissioners was made by Harris before any of the deeds for the lots.

The statute of frauds was enacted in Pennsylvania prior to 1785; and so far as we can see there is no evidence in this case tending to show that any person had a right to a deed from John Harris for any lot in the town, which could have been enforced on or prior to July 6, 1785. When, therefore, on that day, to carry out an agreement which he had previously made in writing, he made a deed for Second street, which, in unambiguous terms, and by a description and reference to a monument on the ground, was so complete that it was not necessary to refer to the plan to locate it, he did that which no one had a right to dispute or gainsay. And when the purchasers of lots abutting on Market square afterwards took deeds from him for their lots, they took them subject to the rights already conveyed by the prior deed. True, a dedication may be by parol as well as by deed, and however made, when once accepted by those for whose benefit it is intended, it cannot be recalled. But whether it has

really been made and the purposes for which it has been made are always questions of fact, and of intention to be inferred from the facts.

And we think that the fact of the preceding promise to execute this deed, and its actual execution, prior to the making of any deed for any of the lots, with the clear and unambiguous intention expressed in it to dedicate the whole of the premises described in it, as a street, must render such dedication effectual, as against the claims that the same land had previously been dedicated for a different purpose, by the verbal sale of the lots, according to the plan of the commissioners, before the deed for the street was made, or by any other acts or declarations that have been shown to have been done or made, even if the square was designated in the plan as Market square; for there is nothing in this conveyance inconsistent with such a designation. It was very common at that time, and for many years later; and, indeed, might be said to be so still, for markets to be held in the streets and in open squares. Many of the markets at that time, and for long years thereafter, if not even now, although established by law, with the right to hold them vested in individuals or corporations, were located in the open streets. The case of Atty. Gen. *ex rel.* Bailey v. Cambridge, L. R. 6 H. L. 303, furnishes a proof and an example of this. So, too, the *Re* Nightingale, 11 Pick. 169, where an act is cited which prescribes "that the limits of Faneuil Hall Market shall be the lower floor of the building, and the street on each side thereof, called North Market and South Market street."

This usage is recognized also in Denehey v. Harrisburg, 2 Pearson (Pa.) 330, and the claim of the city to profit by it is sustained.

It was also acted upon by the authorities of the former borough of Harrisburg, as is shown by some of the ordinances given in evidence in this case, which ordain that the whole space of Market square, from curb to curb, shall be deemed within the limits of the market.

Many other instances of the same kind might be cited from the reports, were it necessary. The right to use the streets is sustained, upon the ground that the inconvenience to the public, occasioned by the temporary obstruction of the streets, is more than counterbalanced by the increased facilities thus afforded for the sale and purchase of the necessaries of life.

But the erection of permanent structures for any purpose, with one exception, upon a public street or square, has uniformly been held illegal. In Wartman v. Philadelphia, 33 Pa. 210, it is said that members of the common council of Philadelphia were mistaken when they voted, in 1773, that they were satisfied of their right to obstruct the middle of the Market street, if they left a proper space for the passage of carriages; and the market houses built in the middle of it were a nuisance previous to the act of 1804, and any citizen could have abated them.

But it is unnecessary to multiply authorities on this point, as it is not controverted by the respondents. The exception is stated thus by GIBSON, Ch. J., in Com. v. Bowman, 3 Pa. 206: "To allow the county reasonable accommodation for its court house and offices in the great square of the county town is one of the usages of our state which has acquired the consistence of law. Such is the foundation of the county's right, and the extent of it."

The conclusion to which we have come on the main question in the case renders it unnecessary for us to consider the effect of the acts of March 19, 1860, March 22, 1861, and April 1, 1863, and the proceedings thereunder; or of the acts of April 9, 1869, and January 2, 1871. The utmost effect they or any of them could have would be to legalize the present buildings; they could not have the effect of legalizing the erection of new enlarged buildings, not then even thought of, on the line of the street; and the only decree asked for in this case is one restraining the erection of new buildings. We therefore express no opinion on the effect of these acts and proceedings.

We have not overlooked any of the arguments advanced in support of the position taken by the respondents; but without specifically adverting to them, for the reasons suggested above, and others which might be given did space permit, we are constrained to sustain the exceptions, and to consider and adjudge that the preliminary injunction be made perpetual.

The assignments of error specified the decree of the court below.

Thos. S. Hargest, for appellant.—If Second street could have been located in 1785 from the deed alone, and there was no necessity for referring to the draught, why was not Second street

made to conform to the deed alone, and thus show a street of uniform width from one end to the other, instead of a street broken and interrupted by a square, as shown by the draught expressly made part of the deed, and which to that extent was in contradiction of the deed description?

As Market square is on the ground, and is in conflict with the deed descriptions, but in exact conformity to the draught made part of the deed, the draught shall control. Com. v. M'Donald, 16 Serg. & R. 390; Schenley v. Pittsburgh, 15 W. N. C. 263.

A space at the intersection of streets making a square, and marked on such a plan, "The Market Square," certainly means a place in which to maintain the public markets.

If such space were to be left open, unimproved, without the buildings in which to hold the markets, the very object of the dedication would fail.

In Klinkener v. M'Keesport, 11 Pa. 444, a space was marked in the plan of the town "for school purposes;" and it was held that although the dedication was made before the common school system was established, yet by provision of law the school district was the proper authority to assume control of the land; and the regulation of school buildings thereon, for common school purposes, was within the trust.

On the map by which William Penn located and dedicated Philadelphia, certain of the spaces set apart for public squares are marked "for public use."

Independence Hall, court house, and other public buildings are erected on one of them because they are held to be within the words "for public use."

In an advertisement published in the London newspapers, admitted in evidence in the case of Com. v. Alburger, 1 Whart. 480, in describing his new city, Penn said: "In the center of the city is a square of ten acres."

"At each angle are to be houses for public affairs, as a meeting house, assembly or state house, market houses, school houses, and several other buildings for public concerns."

This advertisement was taken as evidencing the intention of Penn as to the use to which Centre square was to be devoted; yet nothing appeared on his map of the city by which he dedicated it to show to what public use it was to be applied. It has recently become the site of the public buildings of Philadelphia.

In *Re* Pennypot Landing, 16 Pa. 79, it was held that the

right to regulate a public landing place dedicated for that purpose by Penn along the Delaware river belonged to the city, and that the building of wharves and the charging of wharfage fees was a public regulation and within the use.

In New Orleans v. United States, 10 Pet. 664, 9 L. ed. 573, there was a dedication of the quay along the Mississippi river. The erection of a market house "rendered necessary for the public service" was held a legitimate use within the scope of the dedication.

To the same effect are Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452, and Barclay v. Howell, 6 Pet. 498, 8 L. ed. 477.

In Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521, the dedication contested was by a recorded plot with a space laid off and marked "For the Lutheran Church." A log school house erected on the *locus in quo* was held within the use.

The city of Harrisburg does not contend here that it has the power or authority to erect market houses in one of its streets not opened or dedicated for that purpose, and without the sanction of an act of assembly.

In the case of Wartman v. Philadelphia, 33 Pa. 203, there was no statutory authority enabling the city to erect them; they were subsequently legalized by an act of assembly.

When John Harris accepted the work of the commissioners as returned on their draft on April 14, 1785, ratified the valuation of lots made by them, and subsequently (but prior to execution of the deed of July 6, 1785) allotted nine of the lots fronting on the Market square, according to the aforesaid draft, he irrevocably dedicated the Market square for market purposes, and the streets for public use. His deed of July 6, 1785, could not add to the effectiveness of the dedication.

At that time the doctrine of dedication to public use as part of the common law had not been declared in this country. It was but little known and less understood. The first reported case in which the principle of dedication was adopted and applied was Rex v. Hudson, 2 Strange, 909; the next was Lade v. Shepherd, 2 Strange, 1004, decided three years afterwards. The doctrine was then suffered to sleep until 1790, at least six years after the beginning of the proceedings which resulted in the dedication of Market square. Post v. Pearsall, 22 Wend. 442; Gowen v. Philadelphia Exchange Co. 5 Watts & S. 142, 40 Am. Dec. 489; Com. v. Alburger, 1 Whart. 480.

The act of throwing open property to public use without any other formality is sufficient to establish the fact of the dedication to the public; and if an individual or the city, in consequence of this act, become interested to have it continue so, neither the owner nor his heirs can resume it; nor can anyone claiming under them. Hunter v. Sandy Hill, 6 Hill, 407, 411; Abbott v. Mills, 3 Vt. 521, 23 Am. Dec. 222; State v. Catlin, 3 Vt. 530, 23 Am. Dec. 230; Smith v. State, 23 N. J. L. 140.

Dedication will be presumed from an uninterrupted use by the public. Rex v. Lloyd, 1 Campb. 260; British Museum v. Finnis, 5 Car. & P. 460; Grand Surrey Canal Co. v. Hall, 1 Man. & G. 393.

An open user as of right by the public raises a presumptive inference of dedication, requiring to be rebutted. When such user is proved the onus lies on the party who seeks to deny the inference arising from it to show negatively that the state of the title was such that no one could make a valid dedication. Wartman v. Philadelphia, 33 Pa. 211; Reg. v. Petrie, 4 El. & Bl. 736; Rugby Charity v. Merryweather, 11 East, 375, note; Woodyer v. Hadden, 5 Taunt. 125; Reg. v. Chorley, 12 Q. B. 515; Hunter v. Sandy Hill, 6 Hill, 407; Larned v. Larned, 11 Met. 421, 423; Noyes v. Ward, 19 Conn. 251; Wyman v. New York, 11 Wend. 487; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622; Schenley v. Com. 36 Pa. 29, 78 Am. Dec. 359; Com. v. Fisk, 8 Met. 238; State v. Wilkinson, 2 Vt. 480, 21 Am. Dec. 560.

No particular time is necessary for the evidence of the dedication; it may take place immediately. Woodyer v. Hadden, 5 Taunt. 125.

It may be made by parol. Dover v. Fox, 9 B. Mon. 200.

It may be by immediate presumption. Hunter v. Sandy Hill, 6 Hill, 407; Larned v. Larned, 11 Met. 421, 423; Noyes v. Ward, 19 Conn. 251; Schenley v. Com. 36 Pa. 62; Wyman v. New York, 11 Wend. 487; Livingston v. New York, 8 Wend. 85, 22 Am. Dec. 622.

The sale and conveyance of lots in a town and according to its plan imply a grant or covenant to the purchasers that the streets and other public places, indicated as such upon the plan, shall be forever open to the use of the public. Rowan v. Portland, 8 B. Mon. 232–237; Bowlinggreen v. Hobson, 3 B. Mon. 478–481; Huber v. Gazley, 18 Ohio, 18; Dummer v. Den *ex*

dem. Jersey City, 20 N. J. L. 86–106, 40 Am. Dec. 213; Wickliffe v. Lexington, 11 B. Mon. 163.

Such time and such only is requisite as suffices to acquire that interest with the public, inconsistent with the claims of the owner which would render it fraudulent in him to resume his rights. Adams v. Saratoga & W. R. Co. 11 Barb. 414; Beatty v. Kurtz, 2 Pet. 566, 7 L. ed. 521; Pawlet v. Clark, 9 Cranch, 292, 3 L. ed. 735.

The same principle and rules apply to the dedication of commons, squares and market places as are applied to public highways. Cincinnati v. White, 6 Pet. 431, 8 L. ed. 452.

In M'Connell v. Lexington, 12 Wheat. 582, 6 L. ed. 735, a spring of water was held dedicated, and the dedication was based upon the concurring opinion of the settlers and the early appropriation of it to public purposes.

Com. v. M'Donald, 16 Serg. & R. 390, was an indictment for a nuisance in inclosing and occupying a portion of Water street, which runs along the bank of the Monongahela in Pittsburgh; and the court held that the maps of the city, both the original and those by which all the regulation of the lines of the city were made, showed the *locus in quo* as dedicated to the public use, although the deed from the Penns to the first purchasers was in conflict with the map.

In Rung v. Shoneberger, 2 Watts, 23, 26 Am. Dec. 95, the proprietor had laid out the town in 1795, made a map of it and sold the lots with reference to the map. On the map was written the words "public square, 106 feet by 156." A square had never been precisely located. The court held that the dedication of a public square, without defining its location, was proved by the inhabitants electing a location for it.

Com. v. Alburger, 1 Whart. 469, was an indictment for a nuisance on one of the public squares of Philadelphia. William Penn had laid out a space for a square on the map or general plan of his town, and sold lots by the map as Harris did here. Afterwards, in 1741, Penn's son, Thomas, for himself and his two brothers, executed a grant to a church of a portion of the square for a burying ground, and it was so used until 1834, when Alburger and fourteen others, trustees, elders, and deacons of the German Reformed Church, were indicted for erecting a fence and wooden building on the part used for the graveyard, and convicted.

Com. v. Bowman, 3 Pa. St. 202, was also an indictment and conviction for public nuisance; the county of Bedford built its court house upon the public square of the town of Bedford, before the year 1800; in 1829 the new court house was built on another part of the same square, but the county continued to maintain the old building by renting out a portion of it for a printing office to one of the defendants, while the other occupied a portion of it as his office of county treasurer. The court held that when a new building was erected the old one should have been torn down or abandoned to the municipal authorities.

Com. v. Rush, 14 Pa. 186, was a case of the dedication of a square of 8 acres at the intersection of streets in the city of Allegheny for specific public purposes, among others for a market place. The commonwealth was the owner of the ground, and directed the laying out of the town; surveys and a map were accordingly made with the square shown thereon. It was held that under the dedication the city of Allegheny was authorized to erect a market house, public buildings, such as a town hall, or other useful building, upon the square, but had no right to sell any portion of it. To the same effect are *Re* Penny Pot Landing, 16 Pa. 79; Baird v. Rice, 63 Pa. 498.

On April 13, 1791, the "act to erect the town of Harrisburg, in the county of Dauphin, into a borough" conferred upon the borough authorities the right to "have, hold, and keep, at the place erected for that purpose, within the said borough, two markets in each week," one on Wednesday and one on Saturday, "in every week of the year forever."

On February 1, 1808, the borough charter was changed by an act "to alter an act, entitled 'An Act to Erect the Town of Harrisburg, in the County of Dauphin, into a Borough.'" 4 Smith, Laws, 487.

The act reaffirmed all the provisions of the first law that were unobjectionable, conferred new and additional powers upon the borough authorities, and superseded the act of 1791. It expressly continued in full force the authority to hold and regulate the markets; it recognized them as then subsisting in the market place, and required that "the said inhabitants shall hereafter hold two markets in each week, one on Wednesday and one on Saturday;" it authorized the appointment of a clerk of the market. Under this continuing power the market houses were enlarged and extended from time to time, and the markets estab-

lished and regulated from that time to the present. At the date of the passage of this last-mentioned act, the market sheds were still standing in the square where they now stand. Comming's Narrative, Egle's History of Harrisburg, 310.

They were regulated by ordinances of the town council from time to time.

The upper one was blown down May 30, 1821, and was immediately rebuilt.

The minutes of the town council show that on July 13, 1822, the lower market house was ordered to be rebuilt and extended, so far as to be uniform in size and appearance with the upper one.

It was found as a fact that the present market buildings were the only public markets ever established in the city.

On March 19, 1860, the city received its charter by the act to incorporate the city of Harrisburg. Pamph. L. 1860, p. 175.

By § 46 of that act all the borough laws and ordinances not inconsistent with it were continued in full force; by § 52 all the property and estate of the borough were transferred to the city; by § 55 the rule of construction was declared to be "that, as often as any doubt shall arise, it shall be taken most favorably for the city;" by § 33 eight commissioners were appointed and authorized to make "a survey and plan of all the lands embraced within the limits of said city, designating thereon the avenues, streets, lanes, and alleys now existing and opened."

The commissioners performed their functions, made and returned a survey and plan showing Second street and the Market square, as it is now defined on the ground.

That survey and plan not only shows the Market square, but exhibits it with the market houses standing thereon as they are at this time; and the work of the commissioners, their plot or draft made out and signed by them, was ratified and confirmed, and made valid in every particular for all legal intents and purposes whatsoever (with few exceptions), by the act approved April 1, 1863. P. L. 1863, 244.

From the date of its incorporation, in 1860, the city has continued in the exercise of its franchises to establish and regulate its markets in the public market place conferred by the act of 1791.

In 1869 the supplement to its charter was passed, by which its limits were extended, and another commission of five mem-

bers appointed, with power to make a correct plan or draft of the city. P. L. 1869, 771.

This commission discharged its duty, and returned a general map or plan of the city, also showing Second street and the Market square as they exist on the ground, with the market houses thereon.

By the act of January 2, 1871, P. L. 1871, 1556, this plan or draft of the city of Harrisburg and adjacent territory, authorized and required to be made by commissioners appointed for that purpose, under the authority of the act of assembly of April 9, 1869, was ratified and confirmed in every particular, for all legal intents and purposes whatsoever.

August 25, 1874, the city of Harrisburg accepted the provisions of the act classifying cities in this state, approved May 23, 1874. P. L. 1874, 230.

That act provides, § 57, p. 269, that "no such acceptance [of its provisions] shall be construed to be a repeal or surrender of any rights, powers, privileges, and franchises heretofore by law conferred on such city not inconsistent with the provisions of this act."

The legislature has granted to the people of this city the right of local government, with the right to regulate the use of the Market square, within the object and intention of the dedication. It retains the paramount right of compelling our municipal officers to observe the terms of the dedication as a trust, and to preserve the property for the use for which it was given. It does not retain, and it never had, the right to destroy the trust, divert the use, and abolish the market place, against the consent of a single person who is the successor in the title to one of the purchasers from Harris or his executors. Com. v. Rush, 14 Pa. 186; Le Clercq v. Gallipolis, 7 Ohio, pt. 1, p. 217, 28 Am. Dec. 641; Barclay v. Howell, 6 Pet. 498, 501, 8 L. ed. 477, 478; Williams v. First Presby. Soc. 1 Ohio St. 478; Webb v. Moler, 8 Ohio, 552; Price v. Thompson, 48 Mo. 363; Warren v. Lyons City, 22 Iowa, 351; Price v. Methodist Episcopal Church, 4 Ohio, 515; Brown v. Manning, 6 Ohio, 298, 27 Am. Dec. 255; Board of Education v. Edson, 18 Ohio St. 221, 98 Am. Dec. 114; Harris v. Elliott, 10 Pet. 25, 9 L. ed. 333; Campbell County Ct. v. Newport, 12 B. Mon. 538; Augusta v. Perkins, 8 B. Mon. 207; Atty .Gen. v. Goderich, 5 Grant, Ch. (U. C.) 402; Guelph v. Canada Co. 4 Grant, Ch. (U. C.) 654; French v. Quincy, 3 Allen, 9.

J. M. Wiestling and *Fleming & McCarrell,* for appellees.—The erection of a market house in the center of a public street, rendering, as it does, the highway less commodious, is a nuisance which may be prevented by a bill in equity. State v. Mobile, 5 Port. (Ala.) 279, 30 Am. Dec. 564; Columbus v. Jaques, 30 Ga. 506; Ketchum v. Buffalo, 14 N. Y. 374.

Legislative sanction or authority for the obstruction of a highway or public street, in order to be effective for the purpose, must be clearly expressed; and such sanction or authority is not to be inferred without an express enactment. Stormfeltz v. Manor Turnp. Co. 13 Pa. 555; 1 Dill. Mun. Corp. § 316 and note; 2 Dill. Mun. Corp. § 521; Angell, Highways, § 237.

And if possible the former use must not be defeated by the subjection of the land to the additional use. Little Miami & C. R. Co. v. Dayton, 23 Ohio St. 510.

If it is contended that such legislative sanction may be by implication, the law holds that such implication arises only when requisite to the enjoyment of the powers expressly granted, and can be extended no further than such necessity requires. Hickok v. Hine, 23 Ohio St. 523, 13 Am. Rep. 255.

PER CURIAM:

The decree in this case is affirmed, on the opinion of the court below.

Appeal dismissed; and it is ordered that the appellant pay the costs.

School District of the City of Harrisburg, Plff. in Err., *v.* Christian Long.

In an action for rent reserved in a lease it is not (without proof that the lessee while in possession was led by the fraud of the lessor to execute the lease) a good defense that the lessee executed the lease in ignorance of his rights and was in fact the owner of the premises.

The admission of evidence in support of such a defense would violate the rule that a tenant cannot dispute his landlord's title.

(Argued May 30, 1887. Decided October 3, 1887.)

May Term, 1887, No. 15, M. D., before GORDON, TRUNKEY,

NOTE.—For denial of lessor's title, see note to Diffenderfer v. Caffrey, 6 Sad. Rep. 229.

CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment on a verdict for the plaintiff in an action of debt. Affirmed.

This was an action, begun before an alderman, by Long against the school district of the city of Harrisburg, to recover $150 rent reserved in a written lease of a school house and lot of ground known as the Springdale school property by him to the school board.

Upon appeal from the judgment of the alderman for the plaintiff, the plaintiff at the trial proved that the lease was executed by himself and by the president and secretary of the school board in pursuance of a resolution of the board authorizing them to do so, and proved also that according to the terms of the lease $150, rent, was still due him. He then offered in evidence the following record for the purpose of showing that the defendant had paid other portions of the rent reserved in the lease:

18 January Term, 1885.

Christian Long *v.* The School District of the City of Harrisburg.	Appeal by defendant from the judgment of G. W. Jackson, Esq. March 11, 1885, Rule on plaintiff to declare on thirty days' notice or judgment. (Ex.)

April 3, 1885, statement and copy of lease filed. July 29, 1885, defendant pleads *non est factum,* payment with leave, etc., and set-off. Jan. 12, 1886, special plea filed by leave of court. Jan. T. 1886, I. L. Feb. 2, 1886, trial ordered; jury called, come, etc. All of whom having been duly sworn or affirmed according to law do say Feb. 2, 1886, that they find in favor of the plaintiff for $54.25 and costs. Feb. 3, 1886, motion and reasons for new trial filed. Jan. T. 1886, A. L. 1886. April 19, plaintiff satisfied.

The defendant objected, upon the ground that the record did not show a judgment had been entered. Objection overruled, and record admitted. Exception. First assignment of error.

The plaintiff then rested.

The defendant offered to prove by Simon Duey: First, that William Colder died in possession of the land, and that the

lease of the ground was obtained by false representation of Mr. Long to the school board; second, that if it was not obtained by false representation, it was by an honest mistake of the officers of the district. Objected to, "that at this stage of the proceedings the defendant cannot dispute the title of plaintiff."

By the Court: "As the offer stands we will exclude the evidence." Exception. Second assignment of error.

The defendant then offered to prove by James I. Chamberlain, Esq., that he purchased at assignee's sale in the year 1880, or thereabouts, the piece of land in dispute for the school district of the city of Harrisburg; that afterwards he was met frequently, or that he was met by Mr. Long, the witness being a member of the school board; that Long alleged that the school district had no title to the land on which the school house was located, that it belonged to him, that he had bought it at sheriff's sale and that he would turn the school board out if they did not sign a lease to him; that in pursuance of those representations Mr. Chamberlain afterwards advised the school board to make the lease, saying that he believed that Mr. Long had the title; after which he offered to prove that the school district had the title to the property at the time, the right to the possession of it for school purposes, and that the lease was signed under a mistake by the officers of the district, in that at the time the lease was made they did not know of the contract with Susquehanna township: First, for the purpose of proving fraud in Mr. Long's procuring the lease; second, to show mistake on the part of the officers of the district in signing the lease. Objected to, "as not tending to prove fraud in Mr. Long," and because "a mere mistake will not vitiate title."

By the Court: "While we do not think the evidence offered tends to prove any fraud whatever on the part of the plaintiff, it simply amounts to a claim on his part of title; there is nothing in the evidence offered that would take the case out of the rule that a tenant cannot dispute his landlord's title. He must first turn out and surrender the possession, before he can be put in a position to try the question of title. It cannot be tried in this action. The offer is, therefore, refused." Exception. Third assignment of error.

The defendant next offered to prove by a witness (Charles T. George, who signed the lease as president of the school board)

"that in the year 1863 James Colder entered into a contract with the school district of Susquehanna township, by which he agreed to give them a deed for the land, for the rent of which this suit is brought, if they would build a school house upon the ground; that at that time he was about laying out the town called Springdale, and that he afterwards laid out that town; that the school board of Susquehanna township accepted Mr. Colder's offer, built the school house, fenced in the lot, took possession of it, and held possession of it until 1869; that in the year 1869 the limits of the city of Harrisburg were extended so as to embrace the school property and the village of Springdale; that in the year 1880 the school board purchased at assignee's sale the land in dispute as the property of James Colder; that three or four years later a claim for rent was made by Mr. Long against the school district for this property; that neither the board nor the witness at that time knew anything about the contract between Susquehanna township and Mr. Colder; that Mr. Chamberlain, a member of the board, was appointed to examine into the matter of the claim of Christian Long for rent of the premises; that the result of that examination was that he reported that Mr. Long had purchased the property on a mortgage earlier in date (and bearing date in the year 1876) than the deed of assignment from Mr. Colder to W. W. Jennings, his assignee, in trust, by which the school district thought it had obtained title to the land; that he concluded, and so advised the board, that the title to the land was in Christian Long, and that if the witness had known of the contract between James Colder and Susquehanna township, and the improvements made upon the lot by Susquehanna township, and that possession of the lot had been held for common school purposes from 1863 down to the signing of the lease, he would not have signed the lease, and that he signed it in ignorance of the right of the district to the premises, and by the mistake set forth above. This, for the purpose of showing mistake in the school board—it having already been shown that the school district was in possession of the lot at the time the lease was executed." Objected to—as "irrelevant at this stage of the case," and because "even if proved it would not show such a mistake as would destroy the relation of landlord and tenant."

By the Court: "We think that if these facts were shown they would not entitle the tenant to dispute his landlord's title, and

that therefore they are irrelevant and incompetent." Evidence excluded. Exception. Fourth assignment of error.

The defendant asked the court to charge that "if the jury find the defendant was in legal, peaceful possession of the premises at the time the lease was signed for school purposes under the evidence in this case, without any consideration shown moving from Christian Long to the district, the lease of the ground occupied by them for school purposes is *ultra vires* and void."

By the Court: "In answer to the point we say that we cannot hold under the facts of this case that the lease was void." Exception. Fifth assignment of error.

Levi B. Alricks, for plaintiff in error.—Colder could not have claimed rent for the property, for it was built upon in pursuance of his offer to give a deed for it when so built upon. This deed never was delivered, nor was its delivery necessary. Martin v. M'Cord, 5 Watts, 494, 30 Am. Dec. 342.

By accepting the offer and building the school house upon it the school district of Susquehanna township became the purchaser of the ground, unaffected by the statute of frauds. McLain v. White Twp. 51 Pa. 198.

The limits of the city of Harrisburg were extended by the act of assembly of April 9, 1869 (P. L. 771); and the *locus in quo* became part of the school district of the city of Harrisburg.

Common school act May 8, 1854, § 1 (P. L. 617); also act of April 22, 1868, P. L. 1140, consolidating the two school districts of the city of Harrisburg into the "school district of the city of Harrisburg."

"If the plaintiff in ejectment claims both on an original title and by virtue of a lease from him to the defendant, it is competent to the defendant to defend on both grounds." Miller v. M'Brier, 14 Serg. & R. 382.

In California and some other states one who, being in possession of land, executes a lease to another person and pays rent may defend against the lease without surrendering his possession, without showing fraud or mistake of fact. Tewksbury v. Magraff, 33 Cal. 245; Franklin v. Merida, 35 Cal. 566, 95 Am. Dec. 129; Peralta v. Ginochio, 47 Cal. 459; 4 Wait, Act. & Def. 259.

In England and Pennsylvania a natural person can defend against an action on a lease if he was in possession when it was

made, and has paid rent under it, if the lease was obtained by fraud or was signed in mistake of fact.

Payment of rent in all cases furnishes a strong presumption against the tenant, and it is always a good prima facie case for the landlord; but this is open to explanation, for when it has been paid under a misrepresentation, the tenant is not estopped from resisting further payment after discovery of the mistake. Gravenor v. Woodhouse, 1 Bing. 38.

In replevin proof of payment of rent to the avowant is prima facie evidence that he is the owner of the land. Rogers v. Pitcher, 6 Taunt. 202.

But where the plaintiff did not originally receive the possession of the land from the avowant, it is competent for the plaintiff to rebut the title of the avowant by showing that he paid rent under circumstances which did not entitle the avowant to the rent. Cornish v. Searell, 8 Barn. & C. 471; Fenner v. Duplock, 2 Bing. 10.

That a tenant should not be permitted to contest the title of his landlord is a principle for the encouragement of justice and good faith; but it was certainly a departure from the strict rule of law, and therefore must not be used as an instrument of fraud or violence. Hamilton v. Marsden, 6 Binn. 47.

Even an alleged tenant is not precluded, by the payment of rent or by attornment, from showing that these acts were obtained by fraud, misrepresentation or misapprehension of the facts. Cornish v. Searell, 8 Barn. & C. 471; Rogers v. Pitcher, 6 Taunt. 202; Gravenor v. Woodhouse, 1 Bing. 38; Fenner v. Duplock, 2 Bing. 10; Thayer v. Society of United Brethren, 20 Pa. 62; Cramer v. Carlisle Bank, 2 Grant Cas. 267.

A tenant may impeach his landlord's title, whenever he can show that he was induced to take a lease by misrepresentation and fraud. Miller v. M'Brier, 14 Serg. & R. 382.

A man cannot grant that which he hath not, or more than he hath; although he may covenant to purchase an estate and levy a fine to uses, which will be good. Bacon's Maxims, 58.

"A lease doth properly signify a demise or letting of land, etc., unto another for a lesser time than he that doth let it hath in it." Shep. Touch. 266.

A man cannot make a valid lease to another, who is in possession of land, when such lessor has no interest, title, possession, or right of possession in the premises he lets. The tenant, under

a lease made by such a lessor, should never be estopped from disputing his landlord's title. Hall v. Benner, 1 Penr. & W. 407, 21 Am. Dec. 394; Hockenbury v. Snyder, 2 Watts & S. 249; Baskin v. Seechrist, 6 Pa. 164; Robins v. Kitchen, 8 Watts, 390; Brown v. Dysinger, 1 Rawle, 415; Gleim v. Rise, 6 Watts, 45; Evans v. Bidwell, 76 Pa. 501; Ward v. Philadelphia, 3 Sad. Rep. 233; Berridge v. Glassey, 4 Sad. Rep. 581.

A lease entered into by the president and secretary of a school district, in pursuance of a direction of the school directors of the district, by which it is agreed that the district shall pay rent for land in its possession for school purposes to one without title or right to possession, is *ultra vires.*

The duties and powers of the officers or public agents of the corporation are prescribed by statute or charter, which all persons not only may know, but are bound to know. 1 Dill. Mun. Corp. 2d ed. § 381.

Municipal corporations are creations of law, and can exercise only the powers conferred by law and take none by implication. Leavenworth v. Rankin, 2 Kan. 358. See also Philadelphia v. Flanigen, 47 Pa. 27; Hague v. Philadelphia, 48 Pa. 527.

The act of May 8, 1854, § 23 (P. L. 622), confers upon the directors of every district and comptrollers in cities and boroughs, *inter alia,* the power and duty to "cause suitable lots of ground to be procured and suitable buildings to be erected, purchased, or rented for school houses," etc., but does not give the directors power to relinquish any right the district has without consideration.

The school directors are the trustees for the district; and in default of the appointment of trustees to manage lands dedicated for school purposes for the benefit of the inhabitants of a town plot, the management would devolve upon the school directors under the common law, independent of the acts of assembly conferring it upon them. Pott v. Pottsville, 42 Pa. 132.

The school directors have no right to relinquish property belonging to others. McKissick v. Pickle, 16 Pa. 148.

An officer of a municipal corporation cannot bind the city unless by an act he was legally authorized to do. Dunnigan v. Titusville, 4 Legal Gaz. 234.

A diversion of the municipal property to purposes other than those prescribed by the act will consequently be illegal, upon the

double ground of its being a breach of trust and also *ultra vires.* Green's Brice, Ultra Vires, 58.

Robert Snodgrass, for defendant in error.—A lease given in good faith by one party and accepted by another, with his eyes open, is valid and binding upon both. The mere fact that the tenant has a better title than his landlord does not itself raise the presumption that the lease was a fraud or accepted by mistake. Thayer v. Society of United Brethren, 20 Pa. 60; Ward v. Philadelphia, 3 Sad. Rep. 233.

The evidence offered did not tend to prove any fraud whatever on the part of the plaintiff; it simply amounted to a claim on his part of title; and there is nothing in the evidence offered that could take the case out of the rule that a tenant cannot dispute his landlord's title.

PER CURIAM:

The defendant below was the lessee of the plaintiff; and there is no proof that the lease was obtained from the school district by any species of craft or fraud. The court, therefore, properly held that the tenant could not impeach its lessor's title.

The judgment is affirmed.

American Buttonhole, Overseaming & Sewing Machine Company, Plff. in Err., *v.* F. C. Maurer.

A canvasser for the sale of sewing machines, whom the general agent of the sewing machine company, having authority to employ canvassers, has employed for the company, is entitled to compensation for his services according to the terms of his contract although the contract is for compensa-

NOTE.—A principal is liable for acts done by an agent within the apparent scope of his authority. Griswold v. Gebbie, 126 Pa. 353, 12 Am. St. Rep. 878, 17 Atl. 673; Louchheim v. Davies, 148 Pa. 499, 24 Atl. 72; Hubbard v. Tenbrook, 124 Pa. 291, 2 L. R. A. 823, 10 Am. St. Rep. 585, 16 Atl. 817; Laird v. Campbell, 100 Pa. 159. It is immaterial that the act was not authorized (Hill v. Nation Trust Co. 108 Pa. 1, 56 Am. Rep. 189); or that the principal had imposed a limitation upon the authority of the agent (Williams v. Getty, 31 Pa. 461, 72 Am. Dec. 757; Adams Exp. Co. v. Schlesinger, 75 Pa. 246; Jackson v. Emmens, 119 Pa. 356, 13 Atl. 210).

tion greater than the company by instructions, unknown to the canvasser, authorized the general agent to contract for.

(Argued May 31, 1887. Decided October 3, 1887.)

May Term, 1887, No. 14, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment on a verdict for the plaintiff in an action of assumpsit. Affirmed.

This was an action to recover commissions for the sale of sewing machines.

At the trial it appeared that the plaintiff, Maurer, was hired as selling agent by D. R. Betts, the defendant's manager or agent, who was in control of the Harrisburg office and was authorized to employ selling agents for the defendant. The defendant admitted the hiring, but alleged that Betts was not authorized to contract with subagents except for commissions contingent upon collections, and that the commissions due him on collected accounts were only $3.46. The plaintiff claimed $197 and interest, and it was admitted that this would be due him if he was entitled to commissions upon uncollected accounts.

The defendant asked the court to charge, *inter alia:*

3. The evidence in this case being uncontradicted, that the person who made the alleged contract in suit had no authority to make it, the defendant is not bound by it, and the verdict must be for the defendant.

Ans. Refused. First assignment of error.

The court charged, *inter alia,* as follows:

There are one or two matters of fact in this case for you to determine. The plaintiff's case rests upon a parol contract—a contract by word of mouth. He says that he made with Mr. Betts, an agent of the company, a contract, the terms of which he testified about before you. You must determine what the contract between these two persons was; that is, taking the plaintiff's view of it, you must determine what was meant between the parties in the conversation to which the plaintiff testifies. Assume for a moment it was as he states: that Mr. Betts said that he would give 30 per cent on all sales; it is for the jury to determine what was meant by that 30 per cent on all sales—whether he meant 30 per cent on all sales irrespective of collec-

tions, or whether on the money coming in from those sales. Third assignment of error.

It is said, however, on the other side, as against the plaintiff's allegation, that Mr. Betts had no authority to make this kind of contract. That, however, depends, and we submit to the jury to find, whether he had authority to make contracts with agents; and we say to you if he had authority to make a contract with selling agents, as in this case, that the company is bound by such contracts as he made, although he may have in that particular exceeded his instruction. Second assignment of error.

Hall & Jordan, for plaintiff in error.—To render a principal liable there must be proof of agency. The party alleging it must prove the agent's authority and the extent of it. The act of an agent, within the scope of his authority, is the act of the principal. But the authority of an agent is limited by the very terms of his employment.

The plaintiff below showed no authority in Betts to make such contract as was claimed in the court below. He proved only that Betts was an agent to make contracts with selling agents and had made the contract for contingent commissions. That this was not enough has been held by this court from Moore v. Patterson, 28 Pa. 505, to this day.

No such contracts were shown to have been made with others, and no question of ratification of the company arises.

If a restricted authority be given to an agent, a contract made by him without its limits will impose no obligation on his constituents. Hayden v. Middlesex Turnp. Corp. 10 Mass. 403, 6 Am. Dec. 143; Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 599; New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592; Pennsylvania R. Co. v. Irvine, 35 Phila. Leg. Int. 411.

E. J. Smith, for defendant in error.—A general agent is a person whom a man puts in his place to transact all his business of a particular kind, as, to buy and sell certain kinds of wares, to negotiate certain contracts, and the like. An authority of this kind authorizes an agent to bind his employer by all acts within the scope of his employment; and that power cannot be limited by any private order or direction not known by the party dealing with the agent. Paley, Agency, *199; Smith's

Mercantile Law, *59; Story, Agency, 3d ed. § 126, note 2; Smith, Mast. & S. *292, ed. 1886; Wait, Act. & Def. 220, ed. 1876; 1 Addison, Contr. 3d Am. ed. § 69; Adams Exp. Co. v. Schlessinger, 75 Pa. 246; Tanner v. Oil Creek R. Co. 53 Pa. 417; Hill v. Nation Trust Co. 108 Pa. 1, 56 Am. Rep. 189; Brooke v. New York, L. E. & W. R. Co. 108 Pa. 529, 56 Am. Rep. 235, 1 Atl. 206.

In Pennsylvania R. Co. v. Irvine, 35 Phila. Leg. Int. 411, Gilson was a special agent under limited authority, and Irvine knew of Gilson's limited authority.

The cases of Mechanics' Bank v. New York & N. H. R. Co. 13 N. Y. 599, and New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592, do not apply, because in both cases Schuyler was a special agent, with restricted authority; and those who dealt with him knew of the limit of his authority; hence, those who purchased stock from those to whom it was issued fraudulently could not bind the company in a suit upon said stock.

In Hayden v. Middlesex Turnp. Corp. 10 Mass. 403, 6 Am. Dec. 143, General Bridge, if he was an agent at all, was a special agent with power to make written contracts only, and these written contracts to be null and void unless submitted to and ratified by the directors of the turnpike company.

Moore v. Patterson, 28 Pa. 505, was also a case of special agency.

As to what proof of authority is necessary, see Paley, Agency, XXVIII. Law Lib. *309–*311, where Neal v. Erving, 1 Esp. 61, is cited.

PER CURIAM:

That Betts was the manager or agent of the company defendant, and that as such he had the power to employ canvassers, cannot well be denied, for he so testifies. His power being in these particulars thus general, the question in the case and the only material one was whether he had made with the plaintiff the contract alleged; and this was properly submitted. The company, having obtained the services of Maurer through the contract of its agent, cannot be allowed now to defeat that contract by an attempt to limit his power to contracts for contingent commissions only. The contract undoubtedly bound Maurer; and if so, it also bound the company.

The judgment is affirmed.

Henry E. Rudy's Appeal.

Susanna Erb's Estate

A testamentary gift to a trustee "for the use of my daughter F., who is not capable to act for herself, and put the same to interest, or use the same himself at 5 per cent interest, as he may see fit, and keep, maintain the said F. during her life, or until she becomes, in the judgment of the said trustee, capable to act for herself, then, and in that case, the trustee may pay to her the said interest and of the principal,"—followed by a direction to pay the fund over to F. on her marriage and birth of a child, a limitation over on her death without issue and a direction to the trustee to "keep, support, and maintain, out of said trust fund, my said daughter F." until marriage, etc., or death—constitutes an active, continuing trust.

Such a trust is not affected by proceedings declaring the *cestui que trust* a lunatic, and the trustee cannot be required to pay over the income to the committee.

(Argued May 17, 1887. Decided October 3, 1887.)

January Term, 1887, No. 25, E. D., before MERCUR, Ch. J., GORDON, STERRETT, and CLARK, JJ. Appeal from the decree of the Orphans' Court of Lancaster County directing the payment of interest by a testamentary trustee to the committee of a lunatic. Reversed.

The facts are stated in the opinion.

The assignments of error specified the entry of the decree.

Benjamin F. Davis, for appellant.—In order to comply with the terms of the trust this trustee, appellant, must control the expenditures of the income.

The appointment of the committee does not devest his interest, since there is provision made in the will for receiving and applying the income. Royer v. Meixel, 19 Pa. 240; *Re* Wilson, 2 Pa. St. 325; Canaday v. Hopkins, 7 Bush, 108.

In the absence of an allegation that the appellant misapplied

NOTE.—The same determination is found in *Re* Wilson, 2 Pa. St. 325. If the intention of the testator appears to have been that the trustee should act only until the committee is appointed, the contrary is true. *Re* Earp, 2 Pars. Sel. Eq. Cas. 178.

the trust funds it must be taken to be the fact that he did not. Kellberg's Estate, 86 Pa. 129.

Simon P. Eby, for appellee.—The testatrix contemplated the application of the income of the trust fund to the support of the *cestui que trust.* She did not intend that it should accumulate in the hands of the trustee. Lunatics are to be regarded as infants in many respects. Where a legatee is an infant child of the testator, incapable of supporting himself and having no special means of support, interest will be allowed on the legacy, although the legacy is not payable until a future time. Magoffin v. Patton, 4 Rawle, 113; Seibert's Appeal, 19 Pa. 49; Clark v. Wallace, 48 Pa. 80.

The orphans' court is the proper tribunal to administer this trust. Leslie's Appeal, 63 Pa. 355; Wapples's Appeal, 74 Pa. 100.

Opinion by Mr. Justice Sterrett:

There is nothing in the record to sustain the decree complained of. The testamentary provision made by Mrs. Erb for the benefit of her daughter is an active, continuing trust, unaffected by the proceedings in lunacy. The clauses of her will creating the trust are as follows: "And the other half or share I give and bequeath to the said Henry Rudy in trust for the use of my said daughter Fianna, who is not capable to act for herself, and put the same to interest, or use the same himself at 5 per cent interest, as he may see fit, and keep, maintain the said Fianna during her life, or until she becomes, in the judgment of the said trustee, capable to act for herself, then, and in that case, the trustee may pay to her the said interest and of the principal; and provided further that in case the said Fianna should marry and have lawful children born of her, immediately upon the birth of such child or children, the said trustee shall pay all such trust money, remaining in his hands at the time, unto my said daughter Fianna, her heirs and assigns, and not otherwise; and in default of such lawful children born of my said daughter Fianna, then, upon her death, the balance of said trust money I give to my son Henry Rudy, his heirs, and assigns.

"The said trustee shall keep, support, and maintain, out of said trust fund, my said daughter Fianna until marriage and a lawful child born to her, or her death, as hereinbefore directed."

In carrying out the provisions of the trust it is obviously necessary that the trustee should have the custody and control, not only of the *corpus,* but also of the interest or income arising from the trust property. To require appellant to pay the latter to the committee of the lunatic would deprive him of the only means he has of performing the active duties of the trust as contemplated by testatrix. It is not even alleged that he is mismanaging the trust property or refusing to apply the income in the manner directed by his mother's will.

In the absence of any evidence of either, the committee has no just reason to complain.

Decree reversed and petition dismissed, at costs of appellee.

Samuel H. Irvin's Appeal.

Under the acts of June 16, 1836, and April 20, 1846, a mere naked allegation in the affidavit of a junior judgment creditor, on information and belief, and unsupported by evidence (that a prior judgment was, without consideration, fraudulently and collusively confessed for the purpose of hindering and defrauding such junior judgment creditor, or for a larger sum than was due, or for a debt that has been paid) is insufficient to justify the court in awarding an issue to try the validity of the judgment attacked.

(Argued May 27, 1887. Decided October 3, 1887.)

July Term, 1887, No. 44, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Common Pleas of Huntingdon County discharging rules for

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Cited in Baldwin v. Horron, 19 Pa. Co. Ct. 634, 636, and Poley v. Lally, 5 Kulp, 201, 202.

NOTE.—Provision was made by the act of July 9, 1897, P. L. 237, for the granting of a rule to set aside an alleged fraudulent judgment, after execution issued, on an allegation by any creditor that he has reason to believe that the judgment is invalid and fraudulent, and that he expects to be able to establish such fact at the hearing of said rule. This act was intended to give a general creditor the same standing as if he were a lien creditor. Page v. Williamsport Suspender Co. 191 Pa. 511, 43 Atl. 345.

For the awarding of an issue by the court under the acts of 1836 and 1846, see People's Sav. Bank v. Mosier, 199 Pa. 375, 49 Atl. 132; Moore v. Dunn, 147 Pa. 359, 23 Atl. 596; Baldwin v. Horron, 19 Pa. Co. Ct. 634; Atherholt v. Atherholt, 7 Pa. Super. Ct. 82, 42 W. N. C. 70; Wile Bros. v. Locks, 9 Pa. Super. Ct. 193, 43 W N. C. 424.

feigned issues to try the validity of certain confessed judgments and confirming the report of an auditor to distribute the proceeds of a sheriff's sale of real estate in execution. Affirmed.

The facts as they appeared from the record and before the auditor, D. Caldwell, Esq., are stated in the following opinion, delivered in the court below, by FUEST, P. J.:

Exception is taken to the charge of the auditor for his services in these proceedings. His charge is $210. At first thought we were inclined to the view that the charge was excessive and should not be allowed. Upon further consideration of the case, we are convinced that the report of the auditor does not fully show all labor to which he was subjected. The case was before him for fully a year. There was a sharp contest between contested creditors. Various delays were necessitated by their action. An effort was made by certain creditors to compel the production of ——— papers and notes, not involved in this distribution, but relating to judgments held by Mary Mumper against Mumper and Mumper & Co., which were satisfied by the sale of the personal estate. This contest the auditor brought before the court, upon his own petition for direction in the premises. The result was the court ordered the production before the auditor of all papers and single bills relating to any judgment which could take, or which by any possibility could take, into the distribution of the funds in court, but made no orders as to those which did not relate to this distribution, and which were not claimed by Mrs. Mumper or her assignees as a lien upon the fund. The audit then proceeded. Many adjournments were forced upon the auditor, none of which were at his instance. Finally the contesting creditors presented a bill in equity against Mary A. Mumper *et al.;* and an injunction was issued by the court restraining the auditor from proceeding further. This in due time, upon hearing by the court, was dissolved, and the auditor was directed to proceed. From this decree an appeal was taken to the supreme court, which is still pending. Counsel for creditors applied to the auditor to suspend the audit until this appeal was disposed of, thereby creating considerable delay and trouble to the auditor.

We have ascertained from all the evidence we could obtain from the report of the auditor and the testimony taken, as well as a statement furnished to us by the auditor that he necessarily

spent from eighteen to twenty days in the hearing of the case and disposing of all the questions raised before him and making out his report.

Under the act of June 4, 1879 (Purdon's Digest, p. 144, pl. 4), the compensation to be allowed auditors appointed by the court shall not exceed $10 per day, for each day necessarily engaged in the case, unless upon special cause shown, the court may increase it to $15 per day.

To meet and adjourn is not a day necessarily spent, within the meaning of this act. The act contemplates a reasonable service upon each day engaged in the case.

We have ascertained the number of days, without allowing a day for each meeting, and have come to the conclusion that allowing a certain number of days to cover the adjournments, not exceeding five or six, he was engaged the length of time already stated.

This exception is therefore not sustained.

We come now to consider the application before the auditor for issues to try the validity of said judgments, and the petition presented to the court upon the filing of his report, upon which rules were granted upon Mary A. Mumper and the Provident Life & Trust Company of Philadelphia, to show cause why said issues should not be awarded. These cases were all heard in connection with the exceptions to the auditor's report.

Mary A. Mumper obtained, by confession, a judgment in the court of common pleas, to No. 82, April term, 1883, against John W. Mumper on April 12, 1883, for the sum of $20,951.86. This judgment was entered upon a bill signed dated February 13, 1883, for an indebtedness accruing prior to the partnership of John W. Mumper & Co., which partnership began in the year 1881.

She also obtained a judgment against John W. Mumper and H. L. Beltzhoover, trading as John W. Mumper & Co., upon a bill signed on April 25, 1883, for $9,764.50, to No. 129, April term, 1883.

Before the auditor two petitions were presented by the attorneys of certain creditors of John W. Mumper & Co., namely, Jones, Hoar & Co., H. H. Kline, Henry & Co., S. H. Irvin, and others, praying for issues to be directed by the court of common pleas to try the validity of these judgments.

Afterward a petition was presented to the court on behalf of

all the creditors asking for like issues, etc. These several petitions have the names of the creditors, signed by their several attorneys. They are attached to the auditor's report.

The material allegations of fact are contained in the petition presented to the court, and are set forth in three distinct divisions.

First, that petitioners believe that the aforesaid judgments were without consideration fraudulently and collusively confessed by and between the parties thereto, for the purpose of hindering, delaying, and defrauding the petitioners, etc.

Second, that judgment No. 82, April term, 1883, against John W. Mumper for $20,951.86, was fraudulently confessed for a larger sum than was due, etc.

Third, that if there was any consideration whatever for said judgment No. 82, or if John W. Mumper was, at the execution of the note, in any manner indebted to said Mary A. Mumper, such indebtedness petitioners are advised and believe was fully paid and satisfied prior to the sale of the real estate of John W. Mumper, etc.

This petition is verified by three of the creditors in the following manner, namely: "B. F. Isenberg, one of the members of the firm of Henry & Co., being duly sworn according to law, doth depose and say the facts set forth in the foregoing petition are true to the best of his knowledge, information, and belief."

Upon the filing of this petition in court a rule was granted to show cause why a feigned issue should not be awarded, etc. Thus a full opportunity was given to the petitioners to show to the court, by deposition or in any other proper manner, some fact or facts that were material and in dispute. They failed to show a single fact; and although the case was before the auditor for over a year, not a single fact was shown before him as to the fraudulent character of either of said judgments, or that the judgments were paid as alleged in the third paragraph of petition.

Upon the other hand it was shown, by the deposition of Mary A. Mumper and John W. Mumper, that the judgment for $20,951.86 (the other judgment was not attacked at the same time the deposition was taken), was given for a good and bona fide consideration, which existed for more than a year prior to the formation of the partnership between John W. Mumper and H. L. Beltzhoover, the nature and character of the indebted-

ness being fully set forth, both in the depositions and in the answer referred to therein in the equity proceeding between these same parties. It was further shown that the Provident Life & Trust Company of Philadelphia, which corporation was the guardian of the minor son of Mary A. Mumper, and a part owner of the same real estate, had made a full investigation into the consideration of said judgment, and thereupon had advanced the money to purchase the real estate at the sheriff's sale, taking an assignment of this judgment as security, etc. According to the facts shown in the answer and depositions, none of these petitioners could have had any personal knowledge of the facts set forth in these several petitions.

This is also apparent from the manner in which the petitions are drawn. They are signed by the counsel for the petitioners. There is no allegation in any one of the petitions that any petitioner or creditor has knowledge of the facts therein stated. And this is also further apparent by the careful manner in which the affidavits are made, "upon information." So that these affidavits to the petition merely amount to hearsay, derived from others; the source of which information is withheld from the court by a refusal to produce the same in evidence upon the rule to show cause.

The question then is simply this: Do these petitions, in the manner in which they are verified, show a material fact in dispute, which should determine or influence the court to grant the issue? Section 87 of the act of June 16, 1836, Purdon's Digest, 763, pl. 117, provides: "If any fact connected with such distribution shall be in dispute, the court shall at the request in writing of any person interested direct an issue to try the same," etc. Under this act the law was mandatory, and the issue in this case would have to be granted; and to this effect are a number of decisions of the supreme court. Issues could be obtained upon the written request of an interested party, upon the allegation of a fact in dispute. The result was an endless variety of issues resulting in serious delays and expensive litigation.

To meet this, the act of April 20, 1846, was passed. The second section (Purdon's Digest, p. 763, pl. 118) provides as follows: "Provided, That before an issue shall be directed upon the distribution of money, arising from sales under execution, or orphans' court sales, the applicant for such issue shall make affidavit that there are material facts in dispute therein and

shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted, subject to a writ of error or appeal, by such applicant, if the issue be refused." Are the affidavits to these petitions made in accordance with the act of 1846, and do they of themselves afford sufficient evidence to the court of the existence of a material fact in dispute?

In Knight's Appeal, 19 Pa. 493, Chief Justice BLACK, delivering the opinion of the court, says: "A fact is properly said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. A mere naked allegation without evidence, or against the evidence, cannot create a dispute within the meaning of the law. If it could, a party might stop the distribution, whenever he chooses to make a groundless assertion. The court was right in refusing the issue."

In Robinson's Appeal, 36 Pa. 83, Justice WOODWARD says: "It is not enough for a creditor to swear that the judgment, which is in his way, was confessed by collusion between the parties thereto, and for the purpose of hindering and delaying certain other creditors; but he must set forth in his affidavit that there are material facts in dispute and also the nature and character of such facts. Even under the act of 1836 such an affidavit as we have upon record would have been insufficient. Dickerson's Appeal, 7 Pa. 258, and the cases therein cited. Much more is it insufficient under the act of 20th April, 1846, which, instead of granting the creditors an issue as matter of right, restricts it to the terms and conditions I have stated." Where material facts are stated positively and are shown to be within the parties' knowledge, stating them, and it is further shown that they are in dispute, it would then be the duty of the court, if they deemed them material, to award the issue. But when the party does not state facts within his own knowledge, but upon rumor or hearsay or information derived from others, we think before the court should arrest the distribution and grant the issue the evidence should be laid before the court, so that the court may have facts upon which to determine the propriety of granting or refusing the issue.

This principle is fully recognized in the authorities cited, and also in the case of Christophers v. Selden, 28 Pa. 165, and Dormer v. Brown, 72 Pa. 404.

The cases of Bichel v. Rank, 5 Watts, 140; Trimble's Appeal, 6 Watts, 133, and Reigart's Appeal, 7 Watts & S. 269, were all decided under the act of 1836, and therefore cannot affect the question under the act of 1846.

The practice indicated, of requiring the facts to be shown to the court before an issue is granted or refused, we think, has received the sanction of the supreme court in a number of recent cases, all of which show the wisdom of requiring this preliminary proof before subjecting parties or estates to tedious and expensive litigation. This practice obtains now in the orphans' court, under the several acts of assembly, which are quite as mandatory upon the court, if not more so, as the act of 1846.

By § 41 of the act of March 15, 1832, Purdon's Digest, p. 1476, pl. 20, "whenever a dispute upon a matter of fact arises before any register's (now orphans') court, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof in the form hereinbefore prescribed for the direction of register, changing such parts thereof as should be changed, . . . and the facts established by the verdict returned shall not be re-examined on any appeal."

In Harrison's Appeal, 100 Pa. 458, tried before Judge ELWELL, whose able opinion was adopted as the opinion of the supreme court, referring to the section cited, the court says: "This section is imperative in its terms, and makes a request for an issue a matter of right in any case within its purview. Cozzens's Will, 61 Pa. 196, and Graham's Appeal, 61 Pa. 43; De Haven's Appeal, 75 Pa. 337."

The important question with which we have now to deal is, When, within the meaning of the statute, may a dispute be said to arise? Is it whenever facts are alleged by the contestant, and suggested upon the record; or is it when evidence has been given from which it appears that there is a conflict in the testimony, and a substantial dispute upon material facts?

By § 13 of the act in question the register is authorized to direct an issue when a person entering a *caveat* shall allow matter of fact touching the validity of a will.

Section 41 requires that a dispute in matter of fact shall have arisen before the court can be required to direct an issue.

Now, if nothing more was intended to be required, by the latter section, than a specification of facts alleged to be in dispute,

it is difficult to understand why the phraseology of the two sections is different. But if we consider that the register is not necessarily learned in the law, we may find satisfactory reason why he may send the case to the court upon an allegation of fact.

But the same course of reasoning does not apply to the court; and therefore the law requires that it must appear that a dispute has arisen before the case can be properly sent to a jury for trial. The construction of the act of 1832 was under consideration by the court soon after its passage. In 1845 Judge KING, sitting in the register's court in Philadelphia, in which the inquiry in regard to when a dispute may be said to arise, said: "The dispute as to facts must arise when the cause is on hearing before the court;" that is the time when the court is to judge whether there are truly any facts in dispute. What a party may call a disputed fact may, if the court proceeds, never appear in proof, or may be immaterial to the question before the court, etc. That case was an application to the court for an issue *devisavit vel non,* to test the validity of the will of Wm. Cameron. The request for the issue was first dismissed, upon the ground that it was premature and inadmissible. Afterwards voluminous testimony was taken; and the application was again made to Judge ELWELL for the issue, based upon the facts as proved before the examiner, who, upon full consideration thereof, refused to grant it.

The acts of assembly are so nearly alike in their requirements, as to the manner of granting the issue, and the grounds upon which the court should determine the propriety of either awarding or refusing it, that it seems to us that this case should settle the practice of establishing uniformity of procedure in both courts.

To the same effect is Schwilke's Appeal, 100 Pa. 628.

Applying these principles to the case under consideration, we have only an affidavit made upon information, which is vague, uncertain, and indefinite in the facts stated; it is not made in conformity with the act of 1846; it is not supported by a single fact or circumstance shown to the court, upon which we can form an intelligent conclusion as to whether there is a fact in dispute. Ample time has been given, both before the auditor to show payment of judgment, if such fact existed, and in court upon the rule to show cause to produce some evidence that facts exist which are material, involving the integrity of

the judgments. Nothing has been shown, and we are led to the conclusion that this application is based upon suspicion or mere allegation. At least we are furnished with no facts in dispute upon which we can judicially act. At the same time the parties opposing this issue have shown facts before the court which fully sustain the validity of the judgment and which in detail show the consideration thereof. Cross-interrogatories were filed and answered by both Mary A. Mumper and John W. Mumper, which in no manner impeach the integrity of this judgment. This testimony is not contradicted by any evidence in the cause. The only attack upon it is contained in allegations made upon information alone.

As to judgment No. 129, April term, 1883, before the auditor, no claim was made; according to the evidence submitted to us, the lien of this judgment was released as to all the money in court, and also as to any real estate in Huntingdon county, upon which contesting creditors had liens. This judgment, therefore, does not in any manner stand in the way of petitioners.

For the reasons given, the exceptions to the auditor's report are overruled and the report confirmed; and the rules for feigned issues are discharged, and issues refused.

The assignments of error specified the action of the court in entering this decree.

The paper book of the appellant did not contain the evidence taken on the rules for issues.

Myton & Schock, Petrikin & McNeil, and *Stevens & Owens,* for appellant.—Under the acts of June 16, 1836 (P. L. p. 777, § 87) and April 20, 1846 (P. L. p. 411, § 2), an issue to try disputed facts is a matter of right, upon the appellant complying with their several requirements; *i. e.,* by setting forth in an affidavit that there are material facts in dispute with the nature and character of the same. Souder's Appeal, 57 Pa. 503; De Haven's Appeal, 75 Pa. 341.

Such issues are not to inform the conscience of the court; but are of right to try matters of fact. Dormer v. Brown, 72 Pa. 404.

The appellant in this case was a party interested, being a judgment lien creditor, whose judgment would be paid if the facts in dispute are as he alleges; or if not as he alleges, then

his claim would be worthless. Robinson v. Vandiver, 2 Pearson (Pa.) 96.

A fact is something that was done, exists, or a circumstance in connection with the same, and which is susceptible of proof, and is said to be in dispute when it is alleged by one party and denied by the other, and by both with some show of reason. Knight's Appeal, 19 Pa. 494.

By proving the facts as alleged by the appellant to exist, the judgment of Mary A. Mumper for use of the Provident Life & Trust Company v. John W. Mumper for $20,951.86, and the judgment of Mary A. Mumper v. John W. Mumper and H. L. Beltzhoover for $9,764.50, would be wiped from the records and the judgment of appellant paid. They are therefore material facts.

In Benson's Appeal, 48 Pa. 159, a case almost parallel to one under argument, the petition filed by Benson for an issue set forth that there were material facts in dispute, the nature and character of which were that it was confessed for a much larger sum than was due. The court below refused the issue, for which it was convicted of error, saying: "We are not informed of the grounds upon which the issue was refused in the court below; and as the demand for it was in time, and the nature of the disputed facts explicitly enough set forth, material, if true, we think the court erred in refusing it. The act of assembly is quite imperative, as many decisions show, that the court, under such a statement of the case must grant an issue."

The trial by jury in cases like this is a constitutional right when the requirements of the act of assembly are complied with, and any departure from the mandatory requirements of the act by the court would be an attempt on the part of the court to usurp the powers of the legislature, by repealing statutes in place of enforcing the same. Battin v. Meyer, 5 Phila, 73.

The practice under the act of April 20, 1846, and the act of June 16, 1836, relating to the granting of issues is the same, except so far as the act of 1846 requires an affidavit.

It was the general practice under the act of 1836 for the attorneys for parties interested to make the application (sign it) for issues. Reigart's Appeal, 7 Watts & S. 267; Bichel v. Rank, 5 Watts, 140; Trimble's Appeal, 6 Watts, 133.

The petition and affidavit are but one paper, and should be so considered; and they contain every necessary statement and

averment. Black v. Halstead, 39 Pa. 71; Stewart v. Fenner, 81 Pa. 180; Moeck v. Littell, 82 Pa. 356.

The learned court seeks to unify the practice in the common pleas court, under the acts of June 16, 1836, and April 20, 1846, in relation to the granting of issues, etc., with the practice of the orphans' court under the provisions of the act of March 15, 1832, in relation to the granting of issues; but it cannot be done.

The language, it shall "be lawful," in § 13 of act of April 15, 1832, is not mandatory upon the register. It does not take from him the exercise of a sound legal discretion. In the exercise of that discretion he may decide upon the matters of fact, or will direct the desired issue to the common pleas. Cozzens's Will, 61 Pa. 196; Wickersham's Appeal, 75 Pa. 337; Schwilke's Appeal, 100 Pa. 630.

R. M. Speer and *George B. Orlady,* for the Provident Life & Trust Co., appellee.—The neglect of appellant to print the evidence taken on the rules to show cause, as required by rule XVII. of this court, is a sufficient reason to quash the writ and dismiss the appeal. Graff v. Barrett, 29 Pa. 478; Aiken v. Stewart, 63 Pa. 30; McBeth v. Newlin, 15 W. N. C. 129; Smith v. Arsenal Bank, 104 Pa. 521; Joyce v. Lynch, 1 Sad. Rep. 275; Hyndman v. Hogsett, 111 Pa. 643, 4 Atl. 717.

The object of a paper book is to aid the court in arriving at the truth. Allen v. Laird, 101 Pa. 70.

Whether it was error or not to refuse these issues depends upon the state of facts before the court on March 15, 1887, when these rules were argued.

On the part of the contesting creditors were offered the petitions for the issues, sworn to by three persons on information and belief to the best of their knowledge, stating:

1. That the two aforesaid judgments were without consideration.

2. That No. 82, April term, 1883, was confessed for a larger sum than was due.

3. That No. 82, April term, 1883, was fully paid and satisfied.

The absurdity of these statements is apparent at first glance. If No. 82, April term, 1883, was without consideration, how could it have been fully paid and satisfied, or confessed for a larger sum than was due?

Can it be intelligently urged that this is setting forth the nature and character of facts alleged to be in dispute?

Specific facts should be set out; it must appear that they may be made the subject of controversy as facts *in pais* proper to be passed on by a jury.

The act of assembly was not formed to enable a litigious party to demand an issue under all circumstances and then take his chances before a jury, when there is nothing in the case to call for its intervention. Dickerson's Appeal, 7 Pa. 258.

If there had been "positive evidence of fraud committed in relation to these judgments, within the knowledge of the appellant," as stated in his paper book, p. 43, or had these contesting creditors believed as they allege, that this judgment was without consideration, confessed for more than was due, fully paid and satisfied, or collusive and fraudulently confessed to hinder and delay creditors, and had they any evidence to support such belief, they would have adduced the evidence of it before the auditor, who had full and ample authority to enter into an investigation of the bona fides of the judgment, as decided in Meckley's Appeal, 102 Pa. 542.

As this judgment came in conflict with their claims as creditors they could have avoided it as to them by showing it was a nullity. McNaughton's Appeal, 101 Pa. 555.

By § 86 of the act of June 16, 1833 (Purdon's Digest, 763), the court has the power personally, where there are disputes concerning the distribution of money arising from executions, "to hear and determine the same according to law and equity." By § 87: "If any fact connected with such distribution shall be in dispute, the court shall, at the request in writing of any person interested, direct an issue to try the same," and by the succeeding act of April 20, 1846, § 2, provided: "That before an issue shall be directed . . . the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof; upon which affidavit the court shall determine whether such issue shall be granted."

If the creditor may have an issue upon alleging his conclusions, instead of the facts, the statute is diverted from its purpose, and we shall have feigned issues to try legal conclusions, and abstract reasonings instead of facts. Collusion and fraud are facts when established; but they are not established by the

suspicion of parties, but by the judgment of law passing upon evidence which leads, necessarily, to these conclusions. Robinson's Appeal, 36 Pa. 84.

When a court of equity obtains rightful jurisdiction of a subject, it will comprehend within its grasp all incidental matters necessary to enable it to make a full and final determination of the whole controversy and thus to terminate litigation while it facilitates the remedy. McGowin v. Remington, 12 Pa. 56, 51 Am. Dec. 584.

The orphans' court, for many purposes, is clothed with equity powers. When the jurisdiction has attached over a fund, it comprehends within its grasp all powers necessary to make distribution. Williamson's Appeal, 94 Pa. 236.

With how much greater force does the principle apply, in the common pleas, which courts are granted power and jurisdiction specially for "the discovery of facts material to a just determination of issues and other questions arising or depending in the said court." 1 Purdon's Digest, p. 690, title, *Equity*, § 2, pl. 3.

Montgomery's Appeal, 3 Sad. Rep. 514, is decisive of this case.

PER CURIAM:

We affirm the decree in this case, for reasons stated in the well-considered opinion of the court below.

Decree affirmed, at costs of appellant.

Michael Boring's Appeal.

A payment of interest after the maturity of a debt is not a sufficient consideration to support an agreement to extend the time for payment; and a promise of extension given under such circumstances will not release a surety.

Even an extension for valuable consideration will not release a joint debtor.

(Argued May 25, 1887. Decided October 3, 1887.)

January Term, 1887, No. 106, E. D., before MERCUR, Ch.

NOTE.—It is to be noticed that the payment of interest in this case was not a prepayment, but to liquidate the sum already due. Had it been otherwise, the principle recognized in Grayson's Appeal, 108 Pa. 581, and Sieben-

J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Appeal from a decree of the Common Pleas of Huntingdon County discharging a rule to show cause why a confessed judgment should not be opened. Affirmed.

The facts, as they appeared from the depositions, were stated in the following opinion, delivered by FURST, P. J., upon discharging the rule:

It appears from the evidence in the case that Michael Boring, Thomas J. Gates, Jacob Sharp and others were engaged in and owners of what is termed a "co-operative store" at Mill Creek, in this county. Under what firm name it was carried on does not appear; but that it was a copartnership of some kind is very clear from the evidence. On the 31st of March, A. D. 1883, Thos. J. Gates and Michael Boring gave to Jacob Sharp their judgment exemption note, duly signed and sealed by them, payable one day after date, for the sum of $1,031.28. Judgment was entered upon this note in February, 1886, and execution issued thereon. Jacob Sharp, the payee, died February 14, 1886.

This is an application by Michael Boring, one of the makers of the note, to open the judgment, upon the allegation that he was but a surety upon the note, and that he was discharged from the payment thereof by reason of an extension of time given to Gates, the alleged principal, by Jacob Sharp on the 28th of March, 1884, and on the 31st day of March, 1885. The further defense, that Boring was to be surety only for thirty days, was abandoned on the argument of the case. The evidence failed to show that John Gates, father of Thomas, ever appeared or offered to take his place. Wilson v. Glover, 3 Pa. St. 404.

The first question is, Was Michael Boring a surety in this note? Second, If he was, did the holder of the note release or discharge him by an extension of time to his principal without his knowledge and consent?

First, then, What was the nature of the contract entered into by Boring?

eck v. Anchor Sav. Bank, 111 Pa. 187, 2 Atl. 485, would have applied, and the surety been released. Van Horne v. Dick, 151 Pa. 341, 24 Atl. 1078; Bishop's Estate, 195 Pa. 85, 45 Atl. 582; Mowery v. Brumbaugh, 14 Pa. Co. Ct. 257. In such cases it is necessary that an agreement to extend appears, based on a valid consideration. Dow v. Chambers, 37 Phila. Leg. Int. 399; Farmers' Nat. Bank v. Marshall, 9 Pa. Super. Ct. 621, 44 W. N. C. 68.

It appears from the testimony of defendant's witness, Dr. McCarthy, that the owners of this store sold it on the 31st day of March, 1883, to Thomas J. Gates and Bruce Boring, a son of Michael Boring, for some $2,000. Dr. McCarthy swears, that "this note was given for Sharp's interest in the store." On cross-examination he swears that "Sharp said that he would take Thomas J. Gates and his father for what the company owed him." "I replied that would be as good as cash." "The firm of Gates & Boring was to pay the Sharp note." Michael Boring was doing business for his son Bruce; he said he would put $500 or $600 in the business for his son and that he would have to get through himself after that.

Thomas J. Gates swears: The purchase was concluded on the 31st of March, 1883. Jacob Sharp agreed to take my note with my father as surety for the amount due him from the company. Sharp's interest in the store was $1,031.28.

According to this testimony, which is undisputed, it is clear that the company owed a debt to Sharp of $1,031.28, and that Michael Boring was one of the parties owing the debt; that this note was given to secure the payment of it; such being the case, Michael Boring was a joint debtor in the note, and not merely a surety; hence no extension given, such as testified in this case, would discharge him. This would be sufficient upon which to rule this case, but we prefer to place our ruling upon the ground that Boring was a surety, and in this light let us determine the second question, whether or not he was discharged.

We must not overlook the fact that Jacob Sharp is dead, and the only evidence in the case upon this question is the testimony of Thomas J. Gates, one of the makers of the note.

Admitting, however, that he is competent as a witness for Boring under the authority of Good v. Calvert, 1 Pennyp. 140, was there any consideration for the extension given either on the 28th of March, 1884, or 31st of March, 1885? Did what occurred on these occasions "tie the hands" of Sharp, so as to prevent him from proceeding to collect the note?

We admit that the prepayment of interest on a note is sufficient consideration to support any agreement to extend the time of payment, and the surety not assenting thereto would be discharged. The law pays no regard in such a case to the adequacy of the consideration. Grayson's Appeal, 16 W. N. C. 388; Siebeneck v. Anchor Sav. Bank, 111 Pa. 187, 2 Atl. 485; Uhler v.

Applegate, 26 Pa. 140; Good v. Calvert, 1 Pennyp. 140; Calvert v. Good, 95 Pa. 65.

If a creditor gives time to the principal debtor, the surety is discharged, if by his act he cannot proceed. Clippinger v. Creps, 2 Watts, 48; Henderson v. Ardery, 36 Pa. 451.

Was there any consideration for the promise to extend the time of payment of the note? Was there any prepayment of interest? We think not.

Thomas J. Gates swears that "on the 28th of March, 1884, Sharp said if I would pay him the interest he would extend the note for one year. I agreed to this proposition and paid him the interest; and he agreed to extend the note one year." Sharp indorsed on the note the payment of the interest in full for one year; but he made no indorsement of any agreement to extend the time of payment. It is certainly indisputable that the note was due, and payable on the 1st of April, 1883, and that it bore interest from that date; hence, when the payment of interest was made, on the 28th of March, 1884, the note with its accumulated interest, was overdue one whole year less two or three days. Mr. Sharp was then entitled to receive, not only the interest, but also the principal. The entire debt had been due for a year. What amount was then paid is not stated, except that it was a year's interest. Did they treat the year as having expired on that day, or did Gates pay the interest on the 31st of March, 1884? If he paid the interest for two days more, this can in no sense be considered a prepayment, upon which to predicate the discharge of a surety, because the whole debt was due and payable; and any excess would be treated as a partial payment on the note. Sharp gained no advantage by this payment or by the payment made a year after; he simply received what was legally due him, and only a fraction of that. How then can it be treated as a consideration for a promise to extend the time of payment? He was at liberty to proceed at once to the collection of his debts. Hartman v. Danner, 74 Pa. 36.

Mere indulgence will not discharge a surety. This principle has been so long and firmly held by the supreme court that it is not necessary to cite the authorities. It is sufficient to refer to Rhoads v. Frederick, 8 Watts, 448; United States v. Simpson, 3 Penr. & W. 437, 24 Am. Dec. 331; and Hartman v. Danner, 74 Pa. 36.

Had the interest been paid in advance for the time to which

the payment had been extended, as is the case of Siebeneck v. Anchor Sav. Bank, there would have been a sufficient consideration for the promise and the surety would have been discharged. But such was not the case. The request of the payee was this: If you pay the interest for the past year, which was already due and overdue for a year, he would wait another year or extend the payment that length of time. There was no request to pay interest in advance, and no interest was demanded in advance or paid for the ensuing year at the time of the extension nor until the year had expired. Such being the case the promise to extend was made without consideration; it was merely gratuitous, and did not prevent the plaintiff from proceeding to collect the debt due him.

We therefore discharge the rue to open the judgment.

The assignment of error specified the action of the court in discharging the rule.

Petrikin & McNeil, for appellant.—The payment of one year's interest on March 28, 1884, on the $1,031.28, from April 1, 1883, to April 1, 1884, was a payment of interest on the note four days in advance. Mr. Sharp by his agreement tied his hands, so that he could not have moved one step during the four days to collect the note. This absolutely discharged the appellant who was the surety, who had not assented to the extension.

The prepayment of interest for a single day is a sufficient consideration to support an agreement to extend; and a surety on such note not giving his assent to such an extension will be discharged from liability. Uhler v. Applegate, 26 Pa. 140; Siebeneck v. Anchor Sav. Bank, 111 Pa. 187, 2 Atl. 485; Good v. Calvert, 1 Pennyp. 140; Calvert v. Good, 95 Pa. 65.

The question in such case is whether, by the act or agreement, the surety might have been prejudiced, and not whether he was in fact injured. Clippinger v. Creps, 2 Watts, 46.

After the positive proof, uncontradicted, that Mr. Sharp, in consideration of the payment of the interest, a part of which was in advance, agreed to extend the time for the payment of the note, it was a question for a jury to pass upon. Miller v. Stem, 12 Pa. 389.

W. P. & R. A. Orbison, for appellee.—A payment of part of a debt, either principal or interest, before it is legally demanda-

ble, will be a sufficient consideration to support an agreement to give time. But such payment after maturity of the debt has not the same effect, for the plain reason that in a legal sense it is neither a benefit to the creditor who is entitled to the whole nor an injury to the debtor who ought to have done this and more, without any promise from the creditor. Hartman v. Danner, 74 Pa. 40.

PER CURIAM:

The opinion of the court below so properly and completely disposes of the appellant's case as to render further discussion unnecessary.

The appeal is dismissed and the decree affirmed, at the costs of the appellant.

The MacKellar, Smiths & Jordan Company, Plff. in Err., *v.* Commonwealth of Pennsylvania.

Manufacturing corporations as to which, by the act of June 30, 1885, §§ 20, 21, the tax on capital stock, at the rate of one half mill for each per cent of dividend, imposed by the act of June 7, 1879, is repealed are, by the exception of "any taxes accrued under the laws repealed," subject to taxation under the act of 1879, from the beginning of the tax year 1885 (the first Monday in November, 1884), or from the date of their subsequent incorporation, until June 30, 1885.

In conformity with custom in the apportionment of taxes, the word "accrued" in the act of 1885 means "accruing;" and the sum of all the dividends declared during the tax year 1885, whether before or after June 30, is the basis for estimating the portion accrued upon June 30.

In the interpretation of a doubtful expression in a statute relating to taxation, that construction will, if possible, be given which will best accord with the general system of finances, and the custom created by their administration.

(Argued June 1, 1887. Decided October 3, 1887.)

May Term, 1887, No. 27, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment for the plaintiff in an appeal from the settlement of the Auditor General and State Treasurer. Affirmed.

Cited in Com. v. East Bangor Consol. Slate Co. 10 Pa. Co. Ct. 363.

The plaintiff in error and defendant below, the MacKellar, Smiths, & Jordan Company, was a corporation chartered February 18, 1885, for the manufacture and sale of printing types, electrotypes, wood engravings, and all kinds of printing materials and furnishings, as well as of all tools and machinery used in the manufacture of the same, and had been since its incorporation engaged in said manufacturing business.

The capital stock of said company was $630,000 composed of 6,300 shares of the par value of $100 each. On May 12, 1885, the company declared a dividend of 6 per cent upon said capital, and upon August 6, 1885, another dividend of 6 per cent, each amounting to $37,800.

Upon June 30, 1885, the governor approved the act of assembly entitled "A Further Supplement to an Act Entitled 'An Act to Provide Revenue by Taxation Approved June 7, 1879,'" P. L. 1885, p. 193.

This act provides: "Section 20. That the taxes laid upon manufacturing corporations, by and under the revenue laws of this commonwealth, be and the same are hereby abolished as to such corporations, and the laws, under which such taxes are laid and collected, be and the same are hereby repealed, so far, and so far only, as they apply to and affect manufacturing corporations; Provided, That the provisions of this act shall not apply to corporations engaged in the manufacture of malt, spirituous, or vinous liquors, or in the manufacture of gas; Provided, This act shall go into effect immediately, reserving and excepting unto the commonwealth the right to collect any taxes accrued under the laws repealed by this act.

"Section 21. All acts or parts of acts, inconsistent herewith, be and the same are hereby repealed."

The auditor general and state treasurer settled an account with the MacKellar, Smiths, & Jordan Company as follows:

For tax on capital stock, per act of June 7, 1879, from the first Monday of November, 1884, to June 30, 1885, as per report herewith filed.

Incorporated February 18, 1885.

Dividend, 12 per cent on capital stock, $630,000.

Tax, 6 mills for one year (½ mill for each 1 per cent of dividend), $3,780.

Tax for 4⅓ months, $1,365.

From this settlement the MacKellar, Smiths, & Jordan Company appealed to the common pleas of Dauphin county, and filed the following specification of objections:

1. The appellant is a manufacturing corporation; and the act of June 7, 1879, under which the tax mentioned in said account was claimed by the state, was repealed as to such corporations by § 20 of the act of June 30, 1885, P. L. 193.

2. By said account and settlement the commonwealth is claiming taxes upon a manufacturing corporation which had not accrued prior to the 30th day of June, 1885, and which were expressly abolished by § 20 of the act of June 30, 1885, P. L. 193.

3. By the return made by the said MacKellar, Smiths, & Jordan Company to the auditor general, it appeared that of the dividends declared by the said company, from its incorporation upon February 18, 1885, to the first Monday of November, 1885, one half, to wit, 6 per cent of the capital stock, was declared upon August 6, 1885, after the said act of June 30, 1885, had gone into effect; but the tax is, in the said account and settlement, assessed upon the capital stock at the rate of one half mill for each per cent of dividend, including the said dividend not declared until after the said act went into effect.

By agreement the case was tried by the court without a jury, and SIMONTON, P. J., filed the following opinion and findings of facts:

This cause was tried by the court without a jury, by agreement of the parties, under the act of April 22, 1874.

The facts are as follows:

First. Defendant is a manufacturing corporation, and was chartered February 18, 1885, with a capital of $630,000.

Second. During the tax year, 1885, defendant made dividends amounting to 12 per centum, *viz.*, one of 6 per cent, May 12, 1885, and another of like amount, August 6, 1885.

Third. The act of June 7, 1879, under which the tax is claimed in this case was repealed, with a reservation of the right to collect all accruing taxes, on June 30, 1885, as to manufacturing corporations.

Fourth. The settlement appealed from charges defendant with a tax upon its capital stock, measured by the amount of its dividends, only for the proportion of the tax year included

within the period from February 18, 1885, when it was incorporated, to June 30, 1885, the date of the repeal.

Conclusions of Law.

1. The defendant was subject to taxation during the period of its existence, in which the act of June 7, 1879, was in force, and the settlement is therefore correct. Ebervale Coal Co. v. Com. 91 Pa. 47.

2. The amount due the commonwealth is as follows:

Amount of settlement	$1,365 00
Interest at 12 per cent from March 31, 1886, to February 28, 1887	148 78
Attorney general's commission, 5 per cent	68 25
Total	$1,582 03

For which sum judgment is to be entered for the commonwealth, unless exceptions be filed, according to law.

The defendant thereupon filed exceptions to the action of the court in reaching its conclusions of law, and overruling the defendant's several specifications of objection.

Upon which the court entered judgment as follows, overruling the exceptions:

"April 20, 1887. The exceptions to the findings and decision of the court are overruled, saving that the exception as to date from which interest is charged is sustained and the correct date is found to be May 31, 1886. Judgment is therefore ordered to be entered for the amount heretofore found due, less $27.30 interest overcharged by inadvertence."

The assignments of error specified the action of the court, in overruling the defendant's exceptions and in entering judgment for the plaintiff.

John Marshall Gest and *William P. Gest,* for plaintiff in error.—The act of June 30, 1885, repealed all laws taxing manufacturing corporations, and excepted from its operations only taxes that had accrued at that date. A tax that has accrued means a tax which the state at that time had a right to collect. Precisely speaking, "accrued" means something already due;

and "accruing" means something becoming due. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 64.

"Accrue" is to be added or attached to something else in its generally received sense. Johnson v. Humboldt Ins. Co. 91 Ill. 95, 33 Am. Rep. 47.

"Accrue," to be added. Worcester; Bouvier, Law Dictionary.

The words "had accrued," in the section of the statute specifying what shall be deemed assets which shall go to the executor, signify rents that "had become due and payable" at the time of the testator's death. Fay v. Holloran, 35 Barb. 295.

Where it was customary for the laborers on a road to receive payment on a certain day of each month for the whole of the previous month's work, held, that the claim did not accrue until the usual day of payment, and notice within thirty days thereafter was sufficient. Mundt v. Sheboygan & F. du L. R. Co. 31 Wis. 452.

A cause of action accrues when the defendant's liability is complete, so as to render him liable to suit. Kennedy v. Burrier, 36 Mo. 128.

A statute containing a saving clause of "all rights that had accrued" under former statutes was similarly construed in Ohio. The term "accrued" was held equivalent in its meaning to the word "vested," which necessarily implies that something has been imparted to or conferred upon a third person over which he may have the present right to future possession, of which he cannot be deprived without his assent. It must be a right he can legally assert independent of any future condition of things as well as any subsequent change of the existing law. Hartshorne v. Ross, 2 Disney (Ohio) 15.

An English act provided for the attachment of debts owing or accruing to the judgment debtor. It was held that a salary could not be attached until it was actually payable, that is before pay day, although it might have been and in fact was previously earned. Hall v. Pritchett, L. R. 3 Q. B. Div. 215.

In Skelton v. Mott, 5 Exch. 231, it was held that "accruing" meant debts ascertained and payable *in futuro*.

In Jones v. Thompson, 1 El. Bl. & El. 64, cited in Dresser v. Johns, 6 C. B. N. S. 434, it was held that where the words "accruing" and "owing" are used to designate two classes of debts, they can each receive a distinct meaning only by taking one as denoting debts which are not yet payable and the other

as denoting those which are; and a debt accruing was held to mean one *debitum in præsenti, solvendum in futuro.*

Ebervale Coal Co. v. Com. 91 Pa. 47, is not an authority; for the statute there (act March 20, 1877, P. L. 6) saved taxes accrued or accruing under former laws.

Even on the assumption that a tax accrues by reason of the declaration of a dividend and not on its legal assessment, the state cannot tax the plaintiff in error for a dividend which was declared long after the passage of the act of June 30, 1885.

The word "accrued" means, therefore, due and payable; "accruing" means due but not payable or, *debitum in præsenti, solvendum in futuro;* "accrued" applies to an ascertained debt, payment of which can presently be enforced; "accruing" applies to an ascertained debt, payment of which can only be enforced in the future. An overdue promissory note represents a debt accrued. A promissory note not yet due represents a debt accruing.

An examination of the taxing acts passed in previous years shows that the legislature carefully bore in mind this and other distinctions of language in the phrases employed. Some except in the repealing clause taxes "accrued," some taxes "accrued or accruing," some taxes "due and payable," some taxes "falling due and payable," "taxes now due," or "all unsettled accounts." See the following acts:

June 30, 1885, P. L. 199; April 24, 1885, § 1, P. L. 9; May 22, 1883, § 1, P. L. 39; June 10, 1881, § 6, P. L. 101; June 7, 1879, § 18, P. L. 121; March 20, 1877, § 8, P. L. 10; April 24, 1874, § 11, P. L. 72; April 4, 1874, § 18, P. L. 28; July 18, 1866, § 1, P. L. 1363; February 23, 1866, § 4, P. L. 83; Act April 12, 1859, P. L. 529.

If the legislature had not intended to make a distinction between taxes accrued and taxes accruing there was no sense in using both terms. Moreover, it will be seen that the acts are careful to save taxes "accrued or accruing," except in cases where they are desirous to benefit especially certain subjects of taxation. Thus the act of May 22, 1883, § 1, P. L. 39, exempts building associations and excepts only taxes accrued.

So the act of April 24, 1885, § 1, P. L. 9, releases foreign corporations from the heavy tax to which they were subjected and through which much capital had been driven from the state, saving only taxes accrued. In like manner the act of 1885,

under discussion, in order specially to benefit manufacturers, excepted only taxes which had already accrued.

The act of June 16, 1836, § 119, provided in case of sheriff's sales that the purchaser should be entitled to receive all rent accruing subsequently. The court held that rent accruing meant rent that became due after the sale, and that the defendant in the execution was therefore not entitled to an apportionment. Braddee v. Wiley, 10 Watts, 362.

If, therefore, accruing means due and payable there can be no further question on the subject; for the whole argument of the court below is based upon the assumption that accruing means not due and payable, but growing *de die in diem* and therefore apportionable.

The companies were required by law to report to the auditor general their condition on the first Monday of November; and then the tax is calculated on the basis of the dividends declared, which in the eye of the law measures its financial status. But there is no tax due and no tax accruing until that is done; and until the time fixed for performance has passed, the court can do nothing to enforce payment.

The court in its judgment has charged us with interest at 12 per cent on the amount found due, under the act of May 14, 1874, § 4, P. L. 175, Purdon's Digest, 1385.

But interest at this rate is in the nature of a penalty; and as the act did not reserve the right to the commonwealth to collect a penalty for nonpayment of taxes, interest cannot be charged in this way; but if the tax is due at all, only at the rate of 6 per cent. Com. v. Standard Oil Co. 101 Pa. 150; Easton Bank v. Com. 10 Pa. 451.

It does not appear to have been charged in Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62.

John F. Sanderson, Deputy Atty. Gen., and *W. S. Kirkpatrick,* Atty. Gen., for the commonwealth, defendant in error.—Several cases, involving the question here presented, have arisen in the common pleas of Dauphin county and were decided in favor of the commonwealth. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62.

Precisely speaking "accrued" means something already due, and "accruing" means something becoming due. In common speech, however, the distinction is little regarded. The problem

always is to determine what thought the particular word was intended to express; and in most cases the decision must be made with the help of several facts, *viz.*, the precise or technical meaning of the word, if such exists, its usual or popular meaning if that be different, the context, the occasion, and the subject under discussion. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62; Com. v. Fraim, 16 Pa. 163; Big Black Creek Improv. Co. v. Com. 94 Pa. 450; East Union Twp. v. Comrey, 100 Pa. 367.

Under our system of taxation, the custom of apportionment has grown up and become of much influence; and therefore decisions elsewhere and upon other subjects cannot be given their full weight. We have no statute directing or allowing the apportionment of taxes; but its manifest fairness has been fully recognized for many years, and has often been approved by the courts. Thus, the mileage rule has come to prevail in the case of transportation companies; and in the case of other corporations the principle of apportionment has had much effect in restricting the tax upon capital stock to such proportion thereof as represents the corporation's property within the state; and this, too, whether the corporation is foreign or domestic. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62; Com. v. Standard Oil Co. 101 Pa. 119; Com. v. Pennsylvania Coal Co. 41 Phila. Leg. Int. 125; Com. v. Western U. Teleg. Co. 15 W. N. C. 331; Pullman's Palace Car Co. v. Com. 107 Pa. 156.

It has been applied also to portions of a year. Drexel v. Com. 46 Pa. 31; Com. v. Wyoming Valley Canal Co. 50 Pa. 410; Com. v. American Mach. Co. 2 Chester Co. Rep. 186.

The result has been that, while a corporation tax is still, in strictness, an annual payment ascertained at a fixed time and only then demandable, it is also regarded in Pennsylvania as an obligation distributed over the year, so to speak, and, therefore, not to be exacted in full for a fraction of that period. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62.

The word "accrued" is ambiguous; it may have either of two meanings, one in accordance with this custom and the other a stricter meaning against the custom. In such circumstances the court will presume it to have been used by the legislature in the sense demanded by the practice long prevailing in the accounting departments. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62.

If the expressions of an act of assembly are such as to leave its meaning in doubt, the court will be inclined to give it such a

construction as will best accord with the general system of finances. Com. *ex rel.* Bird v. Bacon, 8 Serg. & R. 135; Stevenson v. Deal, 2 Pars. Sel. Eq. Cas. 217.

The clause of reservation continues the act of 1879, with all its machinery for ascertaining the amount of tax to be paid; and if this view is correct, it makes no difference whether the dividends were declared before or after the passage of the act of 1885, or whether it was necessary to appraise the capital stock. Until the tax year was ended, it could not be known which method of ascertainment must be used; but when the method did become known, the rule of apportionment at once applied. Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62.

A tax may be considered as an obligation distributed over the year; and a portion may be collected under an act of assembly which is supplied by a succeeding act. Ebervale Coal Co. v. Com. 91 Pa. 47.

For cases showing the effect to be given to the custom of the accounting department see: Com. v. Standard Oil Co. 101 Pa. 130; Com. v. Delaware River Bridge Co. (Pa.) 9 Am. L. Reg. 298; Com. v. Pittsburgh & C. R. Co. 2 Pearson (Pa.) 389; Pittsburg, Ft. W. & C. R. Co. v. Com. 66 Pa. 73, 5 Am. Rep. 344; Com. v. Northern C. R. Co. 2 Legal Opinion, 190; *Ex parte* Campbell, L. R. 5 Ch. 703, and Com. v. Hartnett, 3 Gray, 450.

In answer to the comparison of various acts of assembly, made by the plaintiff in error, it is enough to say that the uniform practice of the auditor general's department has been to disregard any supposed distinction arising from the use of the words "accrued" and "accruing" in the various repealing clauses, and to settle the account in accordance with the practice shown by the present case, the case of Com. v. Atlantic Ref. Co. 2 Pa. Co. Ct. 62, and the other cases covered by the opinion therein.

PER CURIAM:

This case was properly disposed of in the court below; and as we can add nothing of importance to what the learned judge has said, we affirm it on his opinion.

Judgment affirmed.

J. D. Christ, Plff. in Err., *v.* M. C. Firestone, to use of A. O. Mays.

A patent right owned by a firm, engaged in dealing in patent rights, will pass to a purchaser for value by an assignment executed by a single partner in the name of the firm.

Section 4898 of the Revised Statutes of the United States, declaring patents assignable by instruments in writing, invalidates unrecorded assignments only as to subsequent purchasers and mortgagees for valuable consideration without notice. It does not, as between the parties, require that assignments shall be evidenced by a writing.

Since a patent may be assigned by parol the authority of a partner to assign it need not be in writing.

(Argued May 27, 1887. Decided October 3, 1887.)

January Term, 1887, No. 359, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Warren County to review a judgment in a verdict for the plaintiff in an issue awarded upon opening a confessed judgment. Affirmed.

This was a judgment for $551.25, confessed on a note under seal with warrant of attorney by J. D. Christ to M. C. Firestone, and marked to the use of A. O. Mays.

A rule to open the judgment and let the defendant into a defense was made absolute on terms that the judgment note should stand as a *narr.* and as evidence of the plaintiff's claim.

At the trial of the issue awarded on the plea of payment, before BROWN, P. J., the following facts appeared:

On May 12, 1884, the defendant, Christ, bought from M. C. Firestone and A. Hewitt, residents of the state of Ohio, the patent right in a patent washing machine in the state of Virginia, and in the county of Armstrong, state of Pennsylvania, which Firestone and Hewitt owned as partners, and received

NOTE.—Under § 4898 of the Revised Statutes of the United States the assignment of a patent must be in writing and be recorded in the patent office within three months, to be valid against a subsequent purchaser or mortgagee for a valuable consideration without notice. See Wolf v. Bonta Plate Glass Co. 6 Northampton Co. Rep. 397, 5 Lack. Legal News, 51.

two deeds for the exclusive right thereto, the one for the state of Virginia signed M. C. Firestone and A. Hewitt. Firestone and Hewitt were the assignees of the patentees of the patent. The sale to Christ, of the patent right in the territory mentioned, was made by Firestone; the deeds therefor were drawn by him and he signed his name and the name of Hewitt to the deed in the absence of the latter, who at the time of the transaction was in the state of Ohio, while this transaction took place at Geneva, Crawford county, Pa.

The consideration for these deeds was notes aggregating $1,300. One note, the one in controversy, for $525, was made payable to Firestone. Another note for the same amount was payable to Hewitt. Two other notes, one for $150 and one for $100, were given; but it did not appear to whom they were payable.

The defendant offered to prove that on the 7th, 21st, and 23d of June and 8th of July, 1884, Hewitt wrote to him letters notifying him that Firestone had no authority to sell his, Hewitt's, one half, and that the deed did not convey his interest in the patent right in the state of Virginia. Objection sustained. Exception. Fourth and fifth assignments of error.

Firestone had no written authority from Mr. Hewitt to sell the latter's interest in the patent right and sign a deed therefor; and the only authority claimed by him was the partnership relation existing between him and Hewitt. This partnership relation was not evidenced by any writing.

The defendant also offered to prove in connection with the offer already mentioned that he made repeated efforts with Hewitt by letter to procure from him the ratification of the deed. Mr. Christ wanted the entire interest in the state of Virginia. His plans were interfered with by the failure to convey Hewitt's title and so disarranged as to make the patent right of much less value or worthless to him; and on the 15th of July, 1884, he rescinded the transaction, sent the deeds by registered letter to M. C. Firestone and demanded back his notes. Objection sustained. Exception. Fourth assignment of error.

On March 6, 1886, judgment was entered upon this note for the face thereof with 5 per cent commission.

The plaintiff gave no evidence.

The defendant submitted the following points:

1. The signatures to the deed, from M. C. Firestone and A.

Hewitt, for the patent right in controversy, having been signed by M. C. Firestone, and it appearing from the uncontradicted evidence that Firestone had no written authority to make the sale of A. Hewitt's interest, or make a deed for his interest, the deed was incompetent to convey said Hewitt's interest in said patent right for want of authority; and the defendant, upon discovering the fact, had a right to rescind the transaction; and if the jury believe, from the evidence, that the defendant did rescind the contract of sale, and tender back the deed, the plaintiff cannot recover in this case.

Ans. This point is answered in the negative. (First assignment of error.)

2. Under all the evidence in this case the verdict should be for the defendant.

Ans. This point is answered in the negative. (Second assignment of error.)

The court directed a verdict for the plaintiff, and this was the subject of the third assignment of error.

D. I. Ball and *C. C. Thompson,* for plaintiff in error.—If through the fault or inability of the vendor the purchaser acquires a valid title to only an undivided one half of what he purchased, he is not obliged to accept the half but may rescind the entire contract. Moore v. Shelby, 2 Watts, 256; Ley v. Huber, 3 Watts, 367.

Every patent is "a grant to the patentee, his heirs or assigns." U. S. Rev. Stat. § 4884, U. S. Comp. Stat. 1901, p. 3381.

Section 4898 requires a transfer of an interest in a patent right to be in writing as follows: "Every patent or any interest therein shall be assignable in law by an instrument in writing; and the patentee or his assigns or legal representatives may, in like manner, grant and convey an exclusive right under his patent to the whole or any specified part of the United States. An assignment, grant, or conveyance shall be void as against any subsequent purchaser or mortgagee for a valuable consideration, without notice, unless it is recorded in the patent office within three months from the date thereof."

Under these laws the interest of the patentees or assignees of the patentee is that of joint tenants, and one joint owner cannot convey the interest of his co-owner.

When there has been an assignment of an undivided part of the whole original patent, the assignee of such patent and the patentee become joint owners of the patent and should join in the surrender; if they do not it will be invalid, unless the part owner not joining shall ratify it. 3 Abbott's Nat. Digest, § 96, p. 458.

Joint owners of a patent right, in the absence of express covenant, have interests which are distinct and separate in their nature. Each party is at liberty to use his moiety as he may think fit, and will not incur any obligation to the other for profits or losses. Vose v. Singer, 4 Allen, 226, 81 Am. Dec. 696; DeWitt v. Elmira Nobles Mfg. Co. 5 Hun, 301; Parkhurst v. Kinsman, 6 N. J. Eq. 600.

Where there are several patentees they are tenants in common. One of them can manufacture and use the article patented without the consent of the others. Dunham v. Indiana & St. L. R. Co. 7 Biss. 223, Fed. Cas. No. 4,151.

One of the two joint owners can legally grant, assign, license, or sell only in respect to his own share or right. He cannot sell or give a good title to his co-owner's right, for the reason that one joint owner of a chattel cannot transfer the share of his coproprietor. Pitts v. Hall, 3 Blatchf. 201, Fed. Cas. No. 11,193.

The above authorities show clearly the nature of the respective interests of Firestone and Hewitt, as assignees of the patent right.

Under the patent laws of the United States an interest of this patent right can only be transferred by writing. Davy v. Morgan, 56 Barb. 218.

A conveyance of a right under a patent of a character to create an interest in the patent itself must be in writing; although a license to make and use a machine need not be in writing, as it need not be recorded, and conveys neither an interest in the patent itself nor a power authorizing a third person to construct the patented articles. Baldwin v. Sibley, 1 Cliff. 150, Fed. Cas. No. 805.

A conveyance of all a person's property, except such as is exempt by law from levy and sale under execution, will not pass the title to a patent, although it may operate upon a chose in action for past infringement. Campbell v. James, 18 Blatchf. 96, 2 Fed. 338.

Since a valid assignment of an interest in a patent right can

only be made by writing, it follows that the power to convey, which must be of as high a character as the instrument to be executed, must also be in writing.

W. D. Hinckley and *C. H. Noyes,* for defendant in error.—Under § 4884 of the Revised Statutes of the United States, every patent is "a grant to the patentee, his heirs, and assigns;" but this language of the statute as to the wording of patent grants, which are but contracts between the government and inventors, does not change the nature of the property in a patent right. Shaw Relief Valve Co. v. New Bedford, 19 Fed. 753; Bradley v. Dull, 19 Fed. 913; Donoughe v. Hubbard, 27 Fed. 742.

Every partner, so far at least as the personal property of a firm is concerned, has the right to sell, assign, or to transfer any part or the whole of the partnership property, in the way of the regular business of the partnership. Each partner possesses an equal and general power and authority in behalf of the firm to transfer, pledge, or otherwise dispose of the partnership property and effects for any and all purposes within the scope and objects of the partnership, and in the course of its trade and business. Parsons, Partn. chap. 7, § 2; Story, Partn. chap. 7.

The evidence in this case is to the effect that A. Hewitt and M. C. Firestone were partners, in the usual relation of equal partners, engaged in the special business of dealing in territorial rights for the patent in question; and had arranged to dispose of their interests and divide the net proceeds.

The evidence offered does not disclose what rights purported to be conveyed to Christ. The written assignment, made at the time, was not offered, and the contents were not given, and it is only by presumption that we can ascertain whether Christ was an assignee, a grantee or a licensee.

If he was the latter, no writing even was necessary. Baldwin v. Sibley, 1 Cliff. 150, Fed. Cas. No. 805.

All that the act of Congress requires is that the assignment shall be in writing so as to be recorded. Fetter v. Newhall, 21 Blatchf. 445, 17 Fed. 841.

Pitts v. Hall, 3 Blatchf. 201, Fed. Cas. No. 11,193, decides that in the case of joint patentees where no agreement of copartnership exists, the relation of co-partners does not result from their connection as joint patentees. Here, the agreement did exist.

PER CURIAM:

The testimony produced in the court below establishes the fact that, as to the patent right in controversy, Firestone and Hewitt were partners; hence, the assignment of Firestone to the defendant passed to him the title of both. The act of Congress invalidates unrecorded assignments only as to subsequent purchasers and mortgagees for valuable consideration without notice. Neither Hewitt's notice nor his letter disclaiming Firestone's authority to dispose of the patent right was of importance in the trial of this case. They being partners, the one could not, in this summary manner, abrogate the power of the other; therefore, the offers of evidence covered by the fourth and fifth assignments of error, were properly refused.

Judgment affirmed.

George W. Geiser, Plff. in Err., *v.* County of Northampton.

Where a statute provides what fees a district attorney shall receive, these fees are the compensation attached by law to the office; and beyond these fees he cannot claim, directly or indirectly, compensation for official services.

Whether certain acts done by a public officer are within the scope of the duties of his office is a question of law and must be decided by the court.

(Argued March 9, 1887. Decided October 3, 1887.)

January Term, 1887, No. 355, E. D. All the Judges present. Error to the Common Pleas of Northampton County to review a judgment of compulsory nonsuit in an action of assumpsit. Affirmed.

This was an action by George W. Geiser against the commissioners of the county of Northampton to recover for professional services. The plaintiff was district attorney for the county, and as such received a compensation fixed by law. The services for which an extra compensation was claimed were rendered in the prosecution of an inquiry into certain charges of misfeasance against county officers. A compulsory nonsuit was entered, upon the ground that the services were within the line of plaintiff's duties as district attorney. A motion to strike off the nonsuit was subsequently refused.

ALBRIGHT, P. J., of the thirty-first judicial district, rendered an opinion, in which the facts were stated as follows:

At the time the services for which plaintiff seeks to recover compensation were rendered he was the district attorney of Northampton county. It appears that at April sessions, 1886, the court instructed the grand jurors concerning their powers and duties to make presentments of offenses of public notoriety and within their (the jurors') knowledge, and that the court especially directed attention to alleged falsifications or other irregularities in the accounts of a late treasurer of the county. The jurors were instructed that if they found sufficient grounds they could make a presentment.

It appears that the grand inquest took cognizance of the matter, and that an investigation was made with a view to further action by that body. To facilitate said inquiry the court, on April 14, 1886, ordered "the county commissioners, county treasurer, and all other county officials to deliver to George W. Geiser, Esq., district attorney, any and all books and accounts which he may desire for the purpose of an investigation into the accounts of the late county treasurer, Sydney Kessler, and that he be permitted to remove the same to such place as he may direct for the purpose of such examination."

On April 16, 1886, the plaintiff, as district attorney, presented his petition to the court of common pleas, representing that in order that the investigation might be thoroughly and satisfactorily made, it was necessary to have certain books which were in said late treasurer's hands, and which the latter declined to give up. What was done pursuant to said petition was not shown clearly; but it seems there was some contest in which the plaintiff and the regularly appointed counsel for the commissioners acted upon the side of the petitioner. A number of books (public records it may be assumed) were removed from the public offices in the court house to the plaintiff's law office, and there an examination of them by the plaintiff and an expert accountant was made, occupying about three weeks. For services in that investigation, including said action in the court of common pleas, and for the use of his law office and for light furnished, the plaintiff seeks to recover in this case. It is claimed that it can be found from the evidence that plaintiff's services in the examination of said accounts (during three weeks) were worth from $100 to $125 a week; that his services

in the court of common pleas were worth about $100, and that the office room and light furnished were of the value of $3 a day.

Whether certain acts done by one who is a public officer are within the scope or line of duty of said office or not, whether or not they are official acts, is manifestly a question of law and must be decided by the court. It would have been error to ask the jury to find whether or not all or any part of the several things done by the plaintiff, and claimed for, came in the line of his duty as district attorney. The powers, duties, and compensation of the district attorney are prescribed by law—what they are is peculiarly a question of law. The statute provides what fees the district attorney shall receive. These fees are the compensation attached by law to the office, the same as if the pay was in the form of an annual salary. Beyond said fees he cannot claim, directly or indirectly, requital for official services. Pa. Const. art. 14, § 5; Wayne County v. Waller, 7 W. N. C. 379; Bussier v. Pray, 7 Serg. & R. 447; Irwin v. Northumberland County, 1 Serg. & R. 505; Mercer County v. Patterson, 2 Rawle, 106.

The learned counsel representing the plaintiff concede that the plaintiff, for official services, can recover nothing except the fees fixed by law. (There is no claim in this action for fees given by the fee bill.) But they insist that what the plaintiff seeks to recover compensation for was outside of his duties as a public officer,—as, said services in the court of common pleas, the supervising of the action of the messenger appointed to procure information in various quarters in the aid of the investigation, the examination of the accounts by the plaintiff, and office room and light.

Everything that was required to be done by an attorney at law in the commonwealth's behalf (in the way of prosecuting or laying the ground for a prosecution), devolved upon the plaintiff as the district attorney of the county.

The object in view was to indict the ex-treasurer (and perhaps other officers) and every act of the plaintiff for which payment is now demanded was done to effect that purpose. The district attorney was seeking evidence to indict and to convict; he sought for it in the books of the treasurer and probably other official books and papers, and in the results of the labors of the special messenger. To obtain access to certain books he invoked the aid of the court of common pleas. To make more convenient and

effective the examination of the books, he had them taken to his own office. Instead of relying upon the expert accountant alone, he gave his own attention to the work. It was an instance of a district attorney giving great and perhaps unusual attention to the preparation of a criminal case. The use of plaintiff's law office and light was involved in the method he adopted to discharge his public duties. It differed only in degree from the use of office room in any other criminal case prepared by the district attorney at his private office.

Upon the facts which could have been found from plaintiff's evidence, he was not entitled to recover.

February 22, 1887, the motion to take off the nonsuit entered at the trial is overruled.

The assignment of error specified the action of the court in refusing to take off the compulsory nonsuit.

Emmens & Walter, for plaintiff in error.—There is no conflict of testimony in this case and therefore no doubt as to the facts. The motion for a compulsory nonsuit is similar in its effect to the entry of a demurrer. It admits the truth of the plaintiff's testimony. Miller v. Bealer, 100 Pa. 583.

Does the testimony warrant the conclusion of the learned judge, that the services were in the line of plaintiff's duty as district attorney?

Surely, it will not be pretended that the court has the power to order the official representative of the commonwealth to make such an investigation. Not as district attorney, but as a practising member of the bar, he was subject to the order of the court. As such, and not as district attorney, according to the uncontradicted testimony, he rendered the services for which he claims compensation. Pike County v. Rowland, 94 Pa. 246.

The duty to pay the plaintiff arises from the benefit derived by the county from such services. Lancaster County v. Brinthall, 29 Pa. 38; Potter County v. Oswayo Twp. 47 Pa. 162.

No compensation can be allowed an officer, whose compensation is fixed by law, etc. But for extra duties an officer may receive extra compensation. Converse v. United States, 21 How. 463, 16 L. ed. 192; United States v. Brindle, 110 U. S. 688, 28 L. ed. 286, 4 Sup. Ct. Rep. 180; Shrope v. Northampton County, 1 Lehigh Valley Law Rep. 197; Allegheny County v. Watt, 3 Pa. St. 462.

Plaintiff's services were required by the proper officers of the

county. The presumption was that in employing him they were acting within the scope of their authority and in the line of their duty. Northumberland County v. Bloom, 3 Watts & S. 542; Northampton County v. Innes, 26 Pa. 158.

The county is liable on the contract of a district attorney for detective services. Pinkerton v. City, No. 382, Dec. T. 1883, C. P. No. 4, Phila.

The county is liable for expenses incurred by the prothonotary of the supreme court in providing a room, stationery, etc., for the use of such court. And the clerk of the court, having paid such expenses, may maintain an action to recover the amount of them from the county. McCalmont v. Allegheny County, 29 Pa. 417.

C. Albert Sandt, for defendant in error.—A contract to perform the duties of an office is implied by the party accepting it. Com. v. Evans, 74 Pa. 124.

The measure of duties and powers of the county commissioners is the plain language of the act of assembly that defines them. Beyond that measure they cannot be made liable for any service of a county officer however meritorious. They could not extend their obligation so as to bind the county even by an express contract. Close v. Berks County, 2 Woodw. Dec. 453.

The district attorney is a county officer and can only receive such fees as are prescribed by law. Pa. Const. art. 14, § 5; Crawford County v. Nash, 99 Pa. 253; Wayne County v. Waller, 7 W. N. C. 379; Bussier v. Pray, 7 Serg. & R. 447; Irwin v. Northumberland County, 1 Serg. & R. 505; Will v. Eberly, 8 Lanc. Bar, 105.

Opinion by Mr. Justice Sterrett:

An examination of the evidence fails to disclose anything that would have warranted a verdict in favor of plaintiff, for any portion of the claim in suit. On the contrary, it is very evident the meritorious services, shown to have been performed by him, were within the scope of his duty as district attorney of the county. Whether they were or not was a question of law for the court and not one of fact for the jury. In taking this view of the case presented by plaintiff's evidence, the court below was clearly right, for reasons given at length in the opinion of the learned judge who presided at the trial.

Judgment affirmed.

Borough of South Waverly, Appt., v. New York, Lackawanna & Western Railroad Company.

A railroad company chartered under the general railroad act of April 4, 1868, has, under the act of February 19, 1849, the right to construct its road over the streets of an incorporated borough, upon making compensation to property owners; and in so doing it is not a trespasser.

The manner of crossing the streets of a borough by such railroad company rests in the sound discretion of the company; and nothing less than a gross abuse of that discretion will justify the interference of a court of equity, after the road is built and in operation.

A resolution was adopted by the common council of a borough, incorporated under the general borough laws, to the effect that a certain railroad company might cross certain streets in the borough by a grade crossing and that the company should "have the privilege of crossing the other streets of this borough according to their present location, bridging Fulton, Loder, and Chemung streets." The company accepted this resolution and built wagon bridges over its track at Chemung and Loder streets, but did not build any bridge at Fulton street. After the construction of the railroad the borough filed a bill alleging the improper obstruction of certain streets by the railroad and setting out the above resolution and its acceptance, and seeking to compel the company to remove the obstructions alleged to have been created in certain streets by its track, and to erect foot bridges at Chemung and Loder streets in addition to the wagon bridges, and bridges at Fulton street. *Held*, that the bill was not maintainable; that it did not present a case calling for the interference of the court to direct the overhauling and reconstruction of the railroad; and that if the contract claimed by the borough to have been created by the said resolution and its acceptance by the company, was a valid contract (which is not decided) and had been violated, the borough had an adequate remedy at law.

(Argued March 16, 1887. Decided October 3, 1887.)

January Term, 1887, No. 71, E. D., before MERCUR, Ch. J., GORDON, PAXSON, TRUNKEY, STERRETT, and GREEN, JJ. Appeal from a decree of the Common Pleas of Bradford County dismissing a bill in equity. Affirmed.

The original bill was filed July 2, 1881, by the borough of South Waverly, a municipal corporation created under the general borough laws, against the New York, Lackawanna, & West-

NOTE.—For the right of a railroad to occupy streets without municipal consent, see Pittsburg v. Pittsburg, C. & W. R. Co. 205 Pa. 13, 54 Atl. 468; Barker v. Hartman Steel Co. 129 Pa. 551, 18 Atl. 553.

ern Railway Company; it alleged that the defendant was building its railroad through the said borough and had taken possession of Bradford and Warren streets, legally authorized streets of said borough, and that the defendant by occupying said streets in the construction of its railroad was obstructing the public travel unlawfully and without right or authority, and that if the defendant was allowed to construct its railroad as commenced by it and as its abutments were being built in the public streets it would be a permanent obstruction to said streets and the public travel.

The prayers of the original bill were: (1) That the defendant be restrained from taking possession of said public streets, or from building the abutments for said railroad in said public streets; (2) that so far as the defendant has occupied said streets by its abutments it be compelled to remove the same; (3) for a preliminary injunction; and (4) for general relief.

On October 3, 1882, plaintiff filed an amended bill, which set forth the following resolutions of its common council:

South Waverly, Pa., July 5, 1881.

At a special meeting, etc.,

Resolved, By the common council of the borough of South Waverly in council assembled, That the N. Y. L. & W. railway cross Bradford and Warren, at their junction, by an easy grade crossing; that they shall commence the said grade at the knoll in front of the residence of Timothy Hireen, grading at an easy grade, westwardly over said railway; also making an easy grade to not less than 400 feet, if required, at the west of said crossing or to the first knoll reached westward; that the said company shall proceed to grade Warren street, commencing at the top of the first knoll south of said Warren street, grading the same as easily as possible over and for not less than 50 feet north from the center line of said railroad to the best of the company's ability with the land now owned by it; that the said company shall make a good and sufficient wagon road on the north side of said railway, allowing travel on the said north side with wagons, etc., to the under crossing already constructed by said company on Wilcox street and said road to be not less than 37½ feet wide—said crossing to be fixed by the said company to the best of the ability of said company to accommodate the traveling public on Bradford and Warren streets; also that

all the streets intersecting at the head of Warren street shall be about on the same level or grade, as near as possible; also that the said railway company pay the costs already made in this case on the part of the plaintiff, including attorney's fees, all not to exceed $25. The said over crossing to be kept in good repair by said company and well planked not less than 50 feet. (Carried by a full vote.)

Resolved, That the N. Y. L. & W. R. R. Co. have the privilege of crossing the other streets of this borough, according to their present location, bridging Fulton, Loder, and Chemung streets, and that at Center and Ulster streets to be made proper grade crossings by said company. (Adopted.)

Resolved, That when the N. Y. L. & W. R. R. Co. settles with the property owners adjacent to the crossing of Bradford street in the west portion of said borough of South Waverly, then the said company may have the right to purchase on the north side of said railway proper land purchased and made into a street, the same will be accepted by this council in lieu of the land taken by it on that portion of Bradford street mentioned herein. The parties mentioned are those owning property on the south side of said railroad from the crossing to Chemung street. (Carried.)

These resolutions were accompanied by a writing executed by the proper agents of the defendant railway company, stating that the company "accept the conditions of the resolutions passed this day in our presence by the council of South Waverly, in regard to the crossing of Bradford and Warren streets, and the other streets in said borough and agree to carry out the conditions of the same."

The amended bill stated that the company had occupied, crossed, and impeded the streets of the borough; that its railway crossed Fulton street from 6 to 10 feet below the grade, leaving the street in a dangerous condition; that bridges had been erected by the company at Loder and Chemung streets over the railway, where it crossed the streets about 12 and 18 feet below grade respectively; that these bridges were much narrower than the streets, and that footbridges, in extension of the sidewalk were practicable and necessary; that although more than a reasonable time had elapsed since the occupancy of said streets, the defendant company had wholly neglected "the proper performance of its duties in the premises."

The prayer for relief in the amended bill was as follows: "And your orators, in addition to the relief already prayed, pray that the defendant company, by the decree and under the direction of the honorable court, be compelled to properly discharge its duties and liabilities with regard to the subject-matter of this bill."

A demurrer to the bill as amended having been overruled, defendant answered, denying any unlawful obstruction of the streets, alleging that it had, at the request of property owners, sloped the embankment on the sides of its track at Fulton street, so as to make an easy approach to and across the track, and that it had left the sidewalks untouched until some agreement could be arrived at by the parties interested as to the manner of constructing the foot crossing, if one was built, or the wagon bridge, if that should be determined on; that defendant had erected a sufficient bridge at Loder street, and that foot walks were impracticable; that it had also erected a sufficient bridge at Chemung street, and that plaintiff had no right to exact a separate foot walk there or at any other crossing.

The answer admits the passage of the resolutions of July 5, 1881, and their acceptance by the company, but alleges that the borough afterwards passed a resolution substantially repealing and rescinding the resolutions of July 5, 1881, and requiring only a good iron footbridge at Fulton street.

The case was referred, upon bills and answer, to S. R. Payne, Esq., as master and examiner, who found the facts substantially as follows:

1. That plaintiff was a municipal corporation, incorporated under the general borough laws.

2. That defendant is a Pennsylvania corporation, duly chartered November 23, 1880, under the general railroad act of April 4, 1868, and the acts amendatory thereof and supplementary thereto.

3. That about June, 1881, defendant commenced the construction of its road through the plaintiff borough (describing its route).

4. That defendant had built two iron wagon roads over its track in the borough, one at Chemung street, the other at Loder street; that no footbridge had been built at either crossing, but such bridges were practicable and necessary; that these bridges

were each twenty feet wide inside the trusses, and that the approaches to them were eight or ten feet narrower than the original streets; that the sidewalks had not been extended up to the approaches of the bridges, and that it was impracticable that they should be so extended on the approaches as they then were and yet leave the wagon roads along the approaches of sufficient width.

5. That the south approach to Chemung street bridge held the water back on both sides of it in the spring of the year; that a culvert under it was necessary for the removal of water; that the ditches by the sides of the approach were somewhat clogged, and needed cleaning out.

6. That Fulton street is the main means of communication between the plaintiff borough and the adjacent village of Waverly, New York; that from all the circumstances (stating them) the public travel on this was so extensive and of such a nature as to demand for its reasonable safety the erection of a bridge which should combine both footbridges and a wagon bridge, above and across defendant's track where it crosses the street.

7. That on July 5, 1881, the common council of the plaintiff borough passed the resolutions set out in the amended bill, and that the company accepted them; that the resolution requiring a bridge at Fulton street was not rescinded by any subsequent action of the town council.

8. That in carrying Warren street under the railroad its width was decreased about eight feet; that no necessity appeared for this; that the space from the bottom of the bridge over this street to the roadbed was about nine feet, whereas it should be at least eleven.

The master found, *inter alia*, as conclusions of law, that aside from all questions of contract the defendant company was under a legal obligation to restore Fulton street and the other streets of the borough when crossed by its railroad, to their former condition of safety for public travel, if such restoration could be made consistently with the reasonable construction and operation of the railroad, and if not, then to restore them in such way as to cause the least danger and least impediment to public travel; that if such restoration required a bridge at Fulton street (and he had found such bridge necessary) then the defendant was under a legal obligation to build it (Pennsylvania

R. Co. v. Duquesne, 46 Pa. 223; Pennsylvania R. Co. v. Irwin, 85 Pa. 336); and the company's contract with the plaintiff to do so made the obligation no stronger and took from the plaintiff no remedy for neglect to build which the plaintiff would have had in the absence of such contract; that these remarks applied with equal force to the footbridges; and that if they were necessary for the safety of the traveling public, an obligation lay on the defendant to build them.

The master also held that neither assumpsit nor case for damages was an adequate remedy in the case, and recommended a decree requiring the defendant: (1) To attach footbridges to the east side of each of the wagon bridges already constructed over the track at Chemung and Loder streets; (2) to build a culvert under the south approach to the Chemung street bridge; (3) to place a guard on the west side of the south approach to the Loder street bridge; (4) to restore the sidewalks to Loder and Chemung streets; (5) to erect a wagon bridge, with footbridge attachments on each side, at the Fulton street crossing; (6) to remove the east abutment of the Warren street bridge out of the street; (7) to increase the space between the top of the highway and the bottom of the bridge at Warren street crossing to 11 feet.

Defendant having excepted to the master's report, the exceptions were sustained by the court, in an opinion by MORROW, P. J., which was substantially as follows:

1. There is no question as to the right of the defendant to construct its road over the streets in question. The tenth section of the act of 1849 gives the right, and it provides that "whenever any company shall locate its road, in or before any street or alley in any city or borough, ample compensation shall be made," etc. The streets exist by force of the commonwealth's authority, and to the commonwealth belongs the franchise of every highway within its limits as trustee of the public (Danville, H. & W. R. Co. v. Com. 73 Pa. 38); and the defendant, in locating and constructing its road over the streets, exercised the power of eminent domain belonging to the sovereignty of the state. It is a liberty granted by the sovereign and cannot be disturbed except by the sovereign power. It clearly does not belong to individual right. Cleveland & P. R. Co. v. Speer, 56 Pa. 334, 94 Am. Dec. 84.

[Any violation of the law, such as creating and maintaining a public nuisance or unreasonably impeding or obstructing travel, is an injury to the public, and must be redressed by proceedings in behalf of the commonwealth; that is to say, the commonwealth alone can maintain the bill.] 1. If the obstruction is of such a character as to be a public nuisance, it may be abated upon conviction in the quarter sessions. Northern C. R. Co. v. Com. 90 Pa. 300.

Taking a street for the purpose of a railroad is taking it for public use (People v. Law, 34 Barb. 502; Danville, H. & W. R. Co. v. Com. 73 Pa. 38), and a private party in the absence of a specific right or authority cannot maintain a bill in equity, to enforce specific performance of a public duty. Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co. 50 Pa. 91, 88 Am. Dec. 534; Cumberland Valley R. Co.'s Appeal, 62 Pa. 218.

2. The resolutions of July 5, 1881, were adopted after the railroad had been located and substantially graded. The abutment was in Warren street. Since their adoption the bridges have been built over Loder and Chemung streets, but none over Fulton street. The master has found the travel at this crossing is dangerous, but he has not found as a fact whether the resolutions were or were not rescinded; but the evidence shows that the defendant constructed portions of its road (after an effort to rescind) under the directions of certain persons, who claimed to act for the borough, but it afterwards turned out no record was made of any such authority. This may explain why no bridge was built at Fulton street. Without any contract the defendant had the unquestioned right to construct its road "in and upon these streets," being liable only for an abuse of that right. As long as there was no violation of law, there was no nuisance, and the company was liable only for damages to owners of lots fronting on the streets. [The resolutions as a contract were inoperative unless the borough was authorized to make the contract under the act of June 9, 1874. P. L. 282.] 2.

Admitting that the word "town" in the act must be construed "borough," then the plaintiff had authority to contract with the defendant, "whereby said railroad company may relocate, change, or elevate their railroad in such a manner as, in the judgment of such authorities, respectively, may be best adapted to secure the safety of lives and property, and promote the interest of said county, city, town, or township."

[The defendant did not relocate its road, nor do the resolutions show in express terms any agreement on the part of the defendant to change or elevate its road; and we are asked to hold that the alleged contract was unauthorized and inoperative; but conceding that it was authorized, the public had an interest in the subject-matter of the contract, and a bill for specific performance cannot be sustained. The remedy is by action for damages.] 3. Mine Hill & S. H. R. Co. v. Lippincott, 86 Pa. 481; Whitney v. New Haven, 23 Conn. 624.

The case of Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471, is not in point, because by its charter the railroad was not to impede or obstruct the free use of the streets; the bill was in the name of the commonwealth; and there was no contract between the railroad company and the borough of Erie.

In Pusey v. Wright, 31 Pa. 387, there was a contract to construct a lateral railroad in a certain manner; and on failure to so construct it, it was held that there was a common-law remedy, and the bill was dismissed.

The same rule is recognized in Gallagher v. Fayette County R. Co. 38 Pa. 103, and Smaltz's Appeal, 99 Pa. 310.

Again; prayers one and two in the original bill are not for relief against any infringement of the contract. The third prayer was for an injunction (which was refused) and the fourth for general relief; and I think the prayer in the amended bill,—to wit, that the defendant be compelled by the decree of this court to properly discharge its duties and liabilities "with regard to the subject-matter of this bill,"—is also for general relief, or at most, for specific performance of the contract.

[The whole matter, therefore, is an attempt to have the court direct and superintend the overhauling and reconstruction of the road, including the building of a bridge over Fulton street, according to the terms of the contract. This we are not inclined to undertake, for the reason the contract, except as to the Fulton street bridge, is vague and uncertain; and if it is valid, there is an adequate remedy at law. If it is not valid, and the defendant has violated the law, we think the remedy is either by indictment or by bill in the name of the commonwealth.] 4.

The master did not discuss this question (of the execution of the contract), because his attention was called only to the act relating to the construction of railroads over public highways in townships, and there their duties are prescribed by the act. Nor

does it seem that his attention was directed to the question of streets and highways being held by the council as trustee for the public.

Thereupon, a decree was entered dismissing the bill, and plaintiff took this appeal, assigning as error: (1–4) The portions of the above opinion inclosed in brackets and designated by exponents; (5) the dismissal of the bill; (6) the refusal to enter the decree recommended by the master; (7) the failure to grant the plaintiff the relief to which it was entitled.

Edward Overton and *John F. Sanderson,* for appellant.—The plaintiff has such an interest in its highways and bridges as to be entitled to maintain this suit, and its remedies are not abridged because the liabilities of the defendant may be defined by agreement. Hooksett v. Amoskeag Mfg. Co. 44 N. H. 105; Troy v. Cheshire R. Co. 23 N. H. 83, 55 Am. Dec. 177; Greenwich v. Easton & A. R. Co. 24 N. J. Eq. 217; State v. Gorham, 37 Me. 451; Hamden v. New Haven & N. R. Co. 27 Conn. 158; Philadelphia v. Friday, 6 Phila. 275; Philadelphia's Appeal, 78 Pa. 33.

The jurisdiction of equity in cases of purpresture and nuisance, although not frequently exercised, seems undoubted. Eden, Inj. 259; 2 Story, Eq. § 921; Jeremy, Eq. Jur. § 1.

The bill may be filed by the public authorities of a city or incorporated district. Smith v. Cummings, 2 Pars. Sel. Eq. Cas. 92. See also Monmouth County v. Red Bank & H. Turnp. Co. 18 N. J. Eq. 91; Hart v. Albany, 9 Wend. 571, 24 Am. Dec. 165; Frankford v. Lennig, 2 Phila. 403; and Philadelphia v. Lombard & S. Streets Pass. R. Co. 3 Grant Cas. 403.

1. The use of a highway by a railway company having rendered the building and maintenance of a bridge necessary, and the railway company having refused to build, it became the duty of the borough to do so; for upon it, as to the public, devolved the duty of keeping the streets in order.

2. Having built, it could recover from the railway company the cost of the bridge.

3. The duty of the company is founded upon the statute as well as upon the law independently thereof. Pennsylvania R. Co. v. Irwin, 85 Pa. 336. See also Woodring v. Forks Twp. 28 Pa. 355, 70 Am. Dec. 134.

A railroad company left a highway dangerous, and the township was held liable. Aston Twp. v. McClure, 102 Pa. 322.

A railroad rightfully constructed and located is not *per se* a nuisance; but it may become such by an improper manner of construction; for by the improper use of legal rights or privileges wrongs may be committed or nuisances created. 1 Rorer, Railroads, pp. 504, 505.

The mere construction of a railroad track across a highway is no nuisance. But it must be constructed in such a manner as not to impede the passage or transportation of persons or property along the same. The necessary running of trains across the highway is not the cause of complaint here; it is the construction of a permanent obstacle in the highway which is a dangerous obstruction to travel, and the maintenance of it there. Such an obstruction of a highway is clearly a nuisance. Northern C. R. Co. v. Com. 90 Pa. 300.

A railroad company has no right in constructing its road across a public highway to encroach upon the highway so as to render it less commodious to the general public without showing some actual or reasonable necessity. Injunction will lie in its absence. Schwenk v. Pennsylvania, S. Valley R. Co. 2 Chester Co. Rep. 177.

A railroad illegally or unduly constructed may be enjoined at the instance of a person suffering special damage, or of the municipal authorities having charge of the highway. Pierce, Railroads, 251.

In Hestonville, M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. 210, the city filed a bill to enjoin the laying of a railroad track. The city failed on the merits; but its right, as a party, to maintain such a suit was not questioned.

By the act of June 19, 1871, P. L. 1361, it is provided that courts may inquire whether corporate acts are rightfully done under corporate franchises, in suits by individuals and other corporations, and grant relief in damages or by injunction. It cannot, therefore, be alleged by the defendant, even if prior to this act the law may be conceded to have been otherwise, that an undue or improper exercise of corporate rights can only be redressed by suit by the commonwealth. Edgewood R. Co.'s Appeal, 79 Pa. 257; McCandless's Appeal, 70 Pa. 210.

The remedy by indictment is inadequate, because an indictment is to punish for past acts, and sentence thereon cannot

regulate future conduct. A railway company cannot be compelled by sentence in such case, either to remove an obstruction or construct a new work. Pittsburgh, V. & C. R. Co. v. Com. 101 Pa. 192. See also Danville, H. & W. R. Co. v. Com. 73 Pa. 29.

Equity, in obvious cases, will interfere and control the action of railway companies in regard to the construction of their works, directing the mode of crossing highways, at the instance of trustees having the charge of the maintenance of such highways. 2 Story, Eq. § 1563.

Courts of equity will decree the specific performance of contracts by a railway company with a landowner with regard to farm crossings and similar works upon lands of the company, in which such party has an interest so material that the nonperformance cannot be adequately compensated at law. 2 Redf. Railways, p. 375.

A court of equity has jurisdiction to enforce specific performance of a contract by a defendant to be defined work on his own property, in the performance of which the plaintiff has a material interest and which is not capable of adequate compensation in damages. Storer v. Great Western R. Co. 2 Younge & C. Ch. Cas. 48; Sanderson v. Cockermouth & W. R. Co. 11 Beav. 497; Lytton v. Great Northern R. Co. 2 Kay & J. 394; Wilson v. Furness R. Co. L. R. 9 Eq. 28; Atty. Gen. v. Mid-Kent R. Co. L. R. 3 Ch. 100; Greene v. West Cheshire R. Co. L. R. 13 Eq. 44; Franklyn v. Tuton, 5 Madd. 469; Lane v. Newdigate, 10 Ves. Jr. 193.

Another ground which makes a court of equity more anxious to decree specific performance of a contract to do certain works, as to build or make a road, is, where the plaintiff by reason of his having parted with his land to the defendant has no opportunity of erecting the buildings at his own cost, and so ascertaining the amount of damages sustained by reason of the nonperformance of the contract. South Wales R. Co. v. Wythes, 1 Kay & J. 200. And see Price v. Penzance, 4 Hare, 506; Storer v. Great Western R. Co. 3 Eng. Ry. & Canal Cas. 106, 2 Younge & C. Ch. Cas. 48; Soames v. Edge, 1 Johns. V. C. (Eng.) 669; Wilson v. Furness R. Co. L. R. 9 Eq. 28.

Again; where there have been acts amounting to a part performance of the contract, the court will compel specific performance, which, without such acts, it might not do. Price v. Pen-

zance, 4 Hare, 506, 509. See also Pembroke v. Thorpe, 3 Swanst. 437, note; Sanderson v. Cockermouth & W. R. Co. 11 Beav. 497; Oxford v. Provand, L. R. 2 P. C. 135; Crook v. Seaford, L. R. 10 Eq. 678; and 1 Lead. Cas. Eq. pp. 1083, 1084.

It may be laid down as a general rule that it is competent for the court to interfere to enforce the specific performance of a contract by the defendant to do definite work upon his own property, in the performance of which the plaintiff has a material interest, and one which is not capable of an adequate compensation in damages. 1 Story, Eq. Jur. § 721, *a*.

The decree recommended by the master is fully sustained by Pierce, Railroads, 251; People *ex rel.* Kimball v. Boston & A. R. Co. 70 N. Y. 569; Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471, and Pennsylvania R. Co.'s Apepal, 93 Pa. 150.

Willard & Warren and *Peck & Overton,* for appellee.—A railroad built upon a public street of a city or borough without authority of law is, undoubtedly, a public nuisance; and its construction will be enjoined in equity. Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471.

The converse of this rule is equally true, where by legislative authority the construction of a railroad is authorized upon and over the streets of a city or borough. Ibid. See also Faust v. Passenger R. Co. 3 Phila. 164; and Danville, H. & W. R. Co. v. Com. 73 Pa. 29.

The railway company being fully authorized to occupy and cross the streets, in the grant from the commonwealth, the proviso in the act of February 19, 1849, "not to impede the passage or transportation of persons or property along the same" must be construed liberally so as not to destroy the grant.

In Bacon v. Arthur, 4 Watts, 440, a similar proviso was so construed. See also Ensworth v. Com. 52 Pa. 320; and Monongahela Bridge Co. v. Kirk, 46 Pa. 112, 84 Am. Dec. 527.

In Northern C. R. Co. v. Com. 90 Pa. 300, we are aware that this court held that the construction of a permanent obstacle in the highway which is a dangerous obstruction to travel, and the maintenance of it there, constituted a public nuisance. In that case the entire highway was blocked by a high bank, rendering it impassable without great danger. The case at bar presents no such facts.

That a municipality has no right to impose terms upon a railroad company occupying its streets by authority of the sovereign is too well settled to be doubted, unless that power is expressly delegated. Pierce, Railroads, 247; Rorer, Railroads, 507; Wood, Railway Law, 985; Mercer v. Pittsburgh, Ft. W. & C. R. Co. 36 Pa. 99; Hestonville, M. & F. Pass. R. Co. v. Philadelphia, 89 Pa. 210.

In the case at bar we assert there are but two parties to the transaction, to wit: the commonwealth and the appellee. The commonwealth owns the streets, and has granted the appellee the right to appropriate them without let or hindrance on the part of the appellant. See Philadelphia v. Lombard & S. Streets Pass. R. Co. 3 Grant Cas. 403; Philadelphia v. Trenton R. Co.'s Case, 6 Whart. 43, 36 Am. Dec. 202; Com. v. Fisher, 1 Penr. & W. 466; Com. v. Erie & N. E. R. Co. 27 Pa. 339, 67 Am. Dec. 471, and Mercer v. Pittsburgh, Ft. W. & C. R. Co. 36 Pa. 99; Cleveland & P. R. R. Co. v. Speer, 56 Pa. 325, 94 Am. Dec. 84; Georgetown v. Alexandria Canal Co. 12 Pet. 91, 9 L. ed. 1012; Milwaukee v. Milwaukee & B. R. Co. 7 Wis. 86.

"For a nuisance that is merely a public wrong, only a public action can be brought; and that must be done by the proper public functionaries." Mechling v. Kittanning Bridge Co. 1 Grant Cas. 416; Flanagan v. Philadelphia, 8 Phila. 110; Butler v. Butler Gas Co. 4 Sad. Rep. 19.

A bill for specific performance will not lie where the public has an interest in the nonperformance of the covenant; on refusal to perform, the only remedy is a recovery of damages for the breach. Mine Hill & S. H. R. Co. v. Lippincott, 86 Pa. 468.

A court of equity will not indirectly enforce specific performance by way of a preliminary injunction; as by restraining the performance of work unless it be done in a particular manner. Philadelphia & R. R. Co. v. Philadelphia, 8 Phila. 112.

OPINION BY MR. JUSTICE PAXSON:

A careful examination of this record, aided by an able argument at bar, and an exhaustive discussion of the case in the paper books, has failed to satisfy us that the learned judge of the court below erred in dismissing the plaintiff's bill. It is true he differed from the master in his view of the case, but the difference was not upon the facts, but upon the law applicable to the facts.

It must be borne in mind that the railroad company had the undoubted right to construct its road over the streets in question. It was not a trespasser, nor were its acts unlawful. It had the right to cross the street in question under the provisions of the act of 1849, upon making ample compensation to property owners injured. The manner of crossing is a matter resting in the sound discretion of the company. Nothing less than a gross abuse of that discretion would justify the interference of a chancellor, after the road is built and in operation. The case as presented fails to satisfy us that there has been any abuse of discretion.

As to the alleged contract between the borough and the railroad company, of date of July 5, 1881, we have only to say that if the borough regards it as a valid contract, and believes it has been violated, it has a remedy at law thereon. As was well observed by the court below: "The whole matter, therefore, is an attempt to have the court direct and superintend the overhauling and reconstruction of the road, including the building of a bridge over Fulton street, according to the terms of the contract. This we are not inclined to undertake, for the reason that the contract, except as to the Fulton street bridge, is vague and uncertain; and if it is valid there is an adequate remedy at law."

The decree is affirmed and the appeal dismissed, at the costs of the appellant.

Guy W. Maynard, Executor of John W. Maynard, Deceased, Plff. in Err. *v.* Lumberman's National Bank of Williamsport.

As a general rule where there are disputed facts, or facts from which other facts may or may not be inferred, it is the duty of the court to submit them all to the jury without instructions as to what inferences they should accept or reject; but when no reasonable construction of the evidence would entitle defendant to a verdict the court may give binding instructions in favor of the plaintiff.

(Argued February 18, 1887. Decided October 3, 1887.)

July Term, 1886, No. 128, E. D. All the Judges present. Error to the Common Pleas of Lycoming County to review a judgment on a verdict for plaintiff in an action of assumpsit. Affirmed.

The facts are sufficiently stated in the opinion.

The following portions of the charge embrace those excepted to:

It does not appear that the bank ever received anything from any person on that note, nor that it has received anything from any person on this stock. [The plaintiff claims that it has established such connection between Judge Maynard and the bank, in reference to this note and this stock, as justifies it in calling upon him to pay over to it what he realized from the stock. The testimony of Charles E. Gibson was offered here, but was rejected by the court on the objections made by the defendant. If he had made no objections, that evidence might have come in and he could have heard what the witness had to say and could have protected himself.]

[The defendant offers no evidence in this case, and there is therefore no contradiction in the evidence for you to pass upon. Thus it becomes the duty of the court, as I view it, to say whether or not the plaintiff is entitled to recover in this case.] [And I cannot believe that this stock went into Maynard's hands, or was held by him lawfully in any other way than as a director or agent of the Lumberman's National Bank.] [And to say the very least, on the 23d of September, 1880, under the circumstances it would be nothing but equity and good conscience—common honesty between man and man—for him to account for it on that day. Turn it over to the bank or account for it.]

The points submitted by the defendant's counsel I refuse. In view of what we have said, it will not be necessary to rule on the points of plaintiff's counsel. [We direct you to find a verdict for the plaintiff for the value of the stock at the price at which he sold it—$105, with interest from August 1, 1883, to which is to be added the five dividends he received, with interest on them respectively from the time they were received, $2,834.34. This is the ruling of the court.]

Defendant requested the court to charge the jury that upon the whole of the evidence the defendant is entitled to their verdict. Refused.

Verdict and judgment for plaintiff.

The assignments of error specified the refusal of defendant's point as above, the portions of the charge inclosed in brackets, the

neglect of the court to put a construction on the written instrument of January 7, 1878, in assuming the determination of questions of fact which should have been submitted to the jury, and in making a charge not adequate to the requirements of the case.

Lloyds, Linn, & Crocker, for plaintiff in error.—The only grounds upon which the plaintiff can recover under the pleadings in this case are: (1) By proving that Judge Maynard acted as the agent, special or general, of the bank, in this transaction with Gibson; and this is the alleged ground of recovery set forth in the special count of plaintiff's narr.; or (2) that, being a director in said bank, Maynard was, *ex officio,* a trustee for the bank in said transaction.

As to the first ground, there is nothing whatever in the testimony given on the part of the plaintiff which goes to establish the relation of principal and agent between the bank and Maynard in the transaction with Gibson; and it was the duty of the court to so instruct the jury.

As to the second ground, as to whether, being a director of the bank, Maynard was, *ex officio,* a trustee for the bank in his dealings with Gibson for the stock, we contend that he was not, for these reasons:

Under the law of Pennsylvania relating to state banks the stock could not have been transferred except subject to the right of the bank to deduct whatever was due to it by Gibson. But this rule does not apply to national banks, and therefore the assignee of Gibson would take this stock without any reference to his indebtedness to the bank. It was therefore entirely competent for Gibson to transfer his stock to Maynard, and he did so upon a legal and sufficient consideration.

Where there are disputed facts in a case, or facts from which others may or may not be inferred, it is the duty of the judge to submit them all to the jury without instruction as to what inferences they should accept or reject. Wenrich v. Heffner, 38 Pa. 207. See also Abraham v. Mitchell, 112 Pa. 230, 56 Am. Rep. 312, 3 Atl. 830; Neslie v. Second & Third Streets Pass. R. Co. 113 Pa. 300, 6 Atl. 72; Madara v. Eversole, 62 Pa. 160; and West Branch Bank v. Donaldson, 6 Pa. 179.

Although no specific instructions were asked, but only a general prayer to the effect that under all the evidence the defendant was entitled to a verdict, yet, if the views advanced by the judge

in his charge are erroneous, they become the subject of a specification of error. Garrett v. Gonter, 42 Pa. 143, 82 Am. Dec. 498.

R. P. Allen, J. A. Beeber, and *John G. Reading, Jr.,* for defendant in error.—It may not be error to submit a case to the jury, even if all the evidence be on one side; yet this was argued, by a very able lawyer, to be error, in West Branch Bank v. Donaldson, 6 Pa. 179; but this court, in passing upon this position of counsel in that case, says: "If the defendants wished to submit the effect of the evidence to the court, their business was to demur to it, not to claim the benefit of a demurrer without the risk of it."

The prayer for instructions presented by the defendant below was to the "court to charge the jury that upon the whole of the evidence the defendant is entitled to their verdict."

There being in the case no facts in dispute, we contend that the court below committed no error in passing upon the legal effect of such undisputed proofs.

It is only in cases where there is controversy in the proofs that the findings must be submitted to the jury; and this rule is recognized in the cases cited by plaintiff in error.

In Wenrich v. Heffner, 38 Pa. 207, there were disputed facts in the case.

In Abraham v. Mitchell, 112 Pa. 230, 56 Am. Rep. 312, 3 Atl. 830, the court below held that under the testimony there was no contract between the parties, express or implied, and directed the jury to find for the defendant; there was a controversy in the evidence, and this court held that a jury should decide it. See also Madara v. Eversole, 62 Pa. 160; Garrett v. Gonter, 42 Pa. 143, 82 Am. Dec. 498; Johnston v. Gray, 16 Serg. & R. 361, 16 Am. Dec. 577; Koons v. Steele, 19 Pa. 204, and McCracken v. Roberts, 19 Pa. 391; Graff v. Pittsburgh & S. R. Co. 31 Pa. 489; Pittsburgh & C. R. Co. v. Clarke, 29 Pa. 146; Prichett v. Cook, 62 Pa. 193, and Jenkins v. Eichelberger, 4 Watts, 121, 28 Am. Dec. 691.

The directors of a corporation are subject to the obligations which the law imposes upon trustees and agents. They cannot, therefore, with respect to the same matters, act for themselves and for it, nor occupy a position in conflict with its interest. Wardell v. Union P. R. Co. 103 U. S. 651, 26 L. ed. 509.

When agents and others acting in a fiduciary capacity understand that these rules will be enforced, even without proof of actual fraud, the honest will keep clear of all dealings falling within their prohibition; and those dishonestly inclined will conclude that it is useless to exercise their wits in contrivances to evade it. Farmers & M. Bank v. Downey, 53 Cal. 466, 31 Am. Rep. 62; Koehler v. Black River Falls Iron Co. 2 Black, 721, 17 L. ed. 342; Bain v. Brown, 56 N. Y. 285; Ball, National Banks, 58; Cumberland Coal & I. Co. v. Parish, 42 Md. 598, 605; Sellers v. Phœnix Iron Co. 13 Fed. 20; Taylor, Priv. Corp. § 628; Morawetz, Priv. Corp. § 517, and cases cited in margin; also § 518.

. Opinion by Mr. Justice Sterrett:

On January 7, 1878, Charles E. Gibson, as a member of the firm Herdic & Gibson was indebted to the Lumberman's National Bank, defendant in error, on a promissory note for $2,000, made by G. W. Sands & Co. to the order of and indorsed by Herdic & Gibson, and duly protested the day before, for non-payment. Gibson's liability to the bank for amount of the note, interests and costs of protest was thus absolutely fixed.

At that time, and for a long time thereafter, John W. Maynard, plaintiff in error's intestate, an active director of the bank, received from Gibson twenty shares of the capital stock of the bank, of the par value of $100 each, for and in consideration of which he agreed "to indemnify him from his liability as indorser" of the dishonored note. The stock, afterwards transferred to Maynard on the books of the bank, was subsequently sold by him for $2,500. When the note was protested the makers and indorsers were and ever since have been insolvent, and no part of the note has, in fact, been paid to the bank. These and other facts are clearly and conclusively established by the evidence.

The declaration, reciting at length the foregoing facts, substantially avers that Maynard received the stock from Gibson as director, officer and agent of the bank as security to it for the payment of the note; and, when he sold the stock, the consideration therefor was received by him to the use of the bank, in payment of the note, and should have been so applied; that although he was bound to so apply the money he received, or pay the same to the bank as holder of the note, he neglected and refused to do so, although often requested, etc.

Defendant below offered no evidence and that of plaintiff was uncontradicted. On defendant's behalf, the court was asked to say that upon the whole of the evidence defendant is entitled to a verdict. On the other hand, the court was requested to instruct the jury "that, under all the evidence, plaintiff is entitled to recover sufficient of the proceeds of the sale of the twenty shares of stock, and of the dividends received by Maynard on same, while in his name, to cover the debt, interest and costs of the G. W. Sands & Co. note, indorsed by Herdic & Gibson, falling due January 6, 1878, for $2,000, to cover the debt and interterest of said note."

Defendant's point was refused, and pursuant to instructions of the court a verdict was rendered in favor of the bank. The point that was refused and portions of the general charge are assigned for error; but the controlling question is whether, upon the facts directly proved and others reasonably and necessarily inferable therefrom, the bank was entitled to recover.

While, as has been stated, nearly all the material averments of the narr. are clearly established by the evidence, there is no direct and positive proof that Maynard in receiving the stock from Gibson acted as agent of the bank and for the purpose of securing payment of the note owned and held by it, but his relation to the bank, and all other facts directly established by the evidence, warrant the inference that he did. Indeed, it is impossible to see how any other inference could have been reasonably drawn by the jury from the undisputed facts in the case. Where there are disputed facts, or facts from which others may or may not be inferred, it is the duty of the court to submit them all to the jury without instruction as to what inferences they should accept or reject (Wenrich v. Heffner, 38 Pa. 207); but, when no reasonable construction of the evidence would entitle defendant to a verdict, the court may properly give binding instructions in favor of the plaintiff. McCracken v. Roberts, 19 Pa. 391.

In this case it would perhaps have been as well to have submitted the case to the jury on all the evidence; but we are not prepared to say there was error in directing a verdict for plaintiff. If the case had been submitted and all the evidence and the jury had given it proper consideration the result should have been the same.

Judgment affirmed.

Jacob C. Cooper, Plff. in Err., v. Allen Shaeffer, Admr. of Daniel Weaver, Deceased.

The disproportion between a life insurance policy for $3,000, assigned to a creditor as security, and $100, the amount of the debt secured, is so great as to constitute the transaction a wager.

If the insurance company pays the amount of the policy to the creditor the administrator of the insured can recover from the creditor the amount so paid less the debt with interest, and the sum which the creditor has paid to keep the policy alive.

If an assignee, from the creditor, of a one-half interest in the policy has received from the company one half the proceeds, he is liable to the administrator for the amount so paid him less one half the debt and interest and the whole amount paid by him to keep the policy alive.

(Argued May 4, 1887. Decided October 3, 1887.)

January Term, 1887, No. 434, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and GREEN, JJ. Error to the Common Pleas of Lebanon County to review a judgment on a verdict for the plaintiff in an action of assumpsit. Affirmed.

This was an action of assumpsit by Allen Shaeffer, administrator of Daniel Weaver, deceased, against Jacob C. Cooper, to recover the excess of proceeds of insurance on the life of the plaintiff's intestate paid by the U. B. Mut. Aid Society of Lebanon, Pennsylvania, to the defendant, over and above the amount of the decedent's indebtedness to the defendant.

At the trial before MCPHERSON, J., the following facts appeared:

In 1875 Weaver being indebted to John Blouch for about

Cited in Ulrich v. Reinoehl, 143 Pa. 238, 250, 13 L. R. A. 433, 24 Am. St. Rep. 534, 22 Atl. 862, and in note to Roller v. Beam, 6 L. R. A. 136.

NOTE.—In the above case the unexplained disproportion was so great that the policy was declared a wager as a matter of law. Evidence of the debtor's expectancy of life, and the cost of maintaining the policy is admissible to show that the seeming disproportion is not an actual one. Ulrich v. Reinoehl, 143 Pa. 238, 13 L. R. A. 433, 24 Am. St. Rep. 534, 22 Atl. 862 See also Shaffer v. Spangler, 144 Pa. 223, 22 Atl. 865; Wheeland v. Atwood, 192 Pa. 237, 73 Am. St. Rep. 803, 43 Atl. 946; Grant v. Kline, 115 Pa. 618, 9 Atl. 150; McHale v. McDonnell, 175 Pa. 632, 34 Atl. 966.

$100, procured this policy for $3,000 and at once assigned it to Blouch who paid the premiums and assessments for several years and then assigned a one-half interest in the policy to the plaintiff Cooper. For several years therafter, and until Weaver's death, Blouch and Cooper paid all the premiums and assessments. Weaver died in 1883; and thereupon the company paid Cooper $1,800 and Blouch the balance.

The court charged the jury as follows:

[The disproportion between an insurance of $3,000 and a debt of $100 is so great as to compel the court to say to the jury that it was a wager policy.] 1

There are of course circumstances that might easily be suggested, in which there would not be sufficient disproportion, and in which there would be a question of fact for the jury; and you might easily cite cases in which it would be a question whether the court should say so, or whether the jury should say so. [But I think, as between $3,000 and $100 we are able to say to the jury that the disproportion is too great. . . . It is my duty to say whether there is enough to warrant a verdict. In my judgment there is not; and if there were a verdict for the defendant in this case, I would set it aside before the jury left the box. So it would be absurd to submit the question to the jury.] 2 . . .

[It is admitted that the original assignment was based upon a debt of $100, which Weaver owed to Blouch for meat furnished to him; and the evidence indicates that the assignment was made for at least the purpose of protecting that debt. We, therefore, say to you that that assignment to Blouch was good for that purpose; that it does protect that debt, and that, so far as this case is concerned, you are to make an allowance for that debt.] 3

You are also to make an allowance for such money as was paid by the defendant here for the purpose of keeping this policy alive. [And with regard to the debt that was due by Weaver to Blouch, it seems to me to be right, since Cooper only owns one half of this policy, that one half of that debt should be a further credit] 3 together with interest upon it, from the time the policy was taken out, or from the time the debt was due up to the time that Weaver died, or when the money was paid over. The difference between those two sums, the amount received by Dr.

Cooper and these sums, will be the amount for which your verdict will be taken.

Verdict and judgment for plaintiff, for $1,100.44.

The assignments of error specified: 1–3, The portions of the charge inclosed in brackets.

J. P. S. Gobin, for plaintiff in error.—The decisions in opposition to wagering policies do not affect the well settled rule that a man may insure his life for the benefit of another, or may protect a creditor by assigning to him a policy originally taken out by himself on his own life. Ætna L. Ins. Co. v. France, 94 U. S. 561, 24 L. ed. 287, note.

The essential thing is that the policy shall be obtained in good faith, and not for the purpose of speculating upon the hazard of a life in which the insured has no interest. When such interest exists, whatever be its nature and whatever the amount insured, it is a valid transaction at its inception, and if the parties to it are satisfied and do not provide for the contingency of disproportion the court cannot do it for them. Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457–463, 24 L. ed. 251–254.

The transaction is not attacked by the insurance company nor by a creditor of the insured, but by a volunteer who places himself in the shoes of the decedent, who lived eight years after this transaction and made no effort to alter or restrict it.

A fair and proper insurable interest as a creditor having been shown to exist at the time of taking out the policy, and that it was taken out in good faith, the object and purpose of the rule which condemns wager policies is sufficiently attained, and there is then no good reason why the contract should not be carried out according to its terms. Corson's Appeal, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192.

Cooper took the policy with every quality of bona fides it possessed. St. John v. American Mut. L. Ins. Co. 13 N. Y. 31, 64 Am. Dec. 529; 2 Duer, 419; Valton v. National Fund Life Assur. Co. 20 N. Y. 32; Ashley v. Ashley, 3 Sim. 149; Cunningham v. Smith, 70 Pa. 450; Clark v. Allen, 11 R. I. 439, 23 Am. Rep. 496.

Bassler Boyer, for defendant in error.—In Cammack v. Lew-

is, 15 Wall. 643, 21 L. ed. 244, the Supreme Court of the United States held that an insurance of $2,000 for Cammack's own benefit, to secure a debt of $70 was so disproportionate as to leave the transaction without any pretext of fairness, and was evidence of a speculative or gambling transaction.

See also Gilbert v. Moose, 104 Pa. 74, 49 Am. Rep. 570; Corson's Appeal, 113 Pa. 438, 57 Am. Rep. 479, 6 Atl. 213.

The question is not one of good faith, but of public policy. Seigrist v. Schmaltz, 113 Pa. 326, 6 Atl. 47; Downey v. Hoffer, 16 W. N. C. 185.

The right to recover is limited to the amount of the interest, at the time of effecting the policy. Dalby v. India & L. Life Assur. Co. 15 C. B. 365; Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457, 24 L. ed. 251; Scott v. Dickson, 108 Pa. 6, 56 Am. Rep. 192; Grant v. Kline, 115 Pa. 618, 9 Atl. 150.

Opinion by Mr. Justice Sterrett:

It is conceded that the policy of $3,000 on the life of Weaver was taken out and immediately assigned to Blouch, for the purpose of securing a debt of $100 due by the former to the latter. Subsequently one half interest in the policy was assigned by Blouch to plaintiff in error, but Weaver was not in any manner a party to that transaction. On the death of Weaver the insurance company, recognizing its liability for the amount insured, paid $1,800 thereof to Cooper, and the residue to Blouch.

In view of the undisputed facts, the learned judge of the common pleas held that the disproportion between the insurance, $3,000, and the debt, $100, was so great as to require him to say, as matter of law, that the transaction was a wager, and that the assignees of the policy had no right to retain more of the insurance money received by them than the amount of the debt, plus the premiums paid and interest thereon. In this he was clearly right. The disproportion is so great as to make the insurance a palpable wager, and no court should hesitate to declare it so as matter of law.

It has heretofore been correctly said that the sum insured must not be disproportionate to the interest the holder of the policy has in the life of the insured; but we have never found it necessary to adopt any rule by which such disproportionate interest may be determined.

Speaking for himself, our brother Paxson, in Grant v. Kline,

115 Pa. 618, 9 Atl. 150, suggests that a policy taken out by a creditor on the life of his debtor ought to be limited to the amount of the debt with interest and the amount of premiums with interest thereon, during the expectancy of the life insured according to the Carlisle tables. This appears to be a just and practicable rule.

It is not easy to define with precision what will in all cases constitute an insurable interest, so as to take the contract out of the class of wagering policies; but, as is said in Corson's Appeal, 113 Pa. 438, 445, 57 Am. Rep. 479, 6 Atl. 213: "In all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary, or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured. Otherwise the contract is a mere wager, by which the party taking the policy is directly interested in the early death of the assured. Such policies have a tendency to create a desire for the event. They are, therefore, independently of any statute on the subject, condemned as against public policy."

But in such a case as the one before us, where the disproportion is so great, there can be no doubt as to the character of the transaction. There is no merit in either of the specifications of error.

Judgment affirmed.

Reuben Leonard, Plff. in Err., *v.* Elizabeth Leonard.

The action of the court of common pleas in setting aside a sheriff's sale of real estate in execution is a matter of discretion not reviewable by the supreme court on writ of error.

It seems that where an assignor for the benefit of creditors becomes indebted, after the assignment, to two persons, one of whom is the assignee, both of whom get judgment before the land, remaining after the payment of the debts secured by the assignment, has been reconveyed to the assignor, and the assignee issuing execution on his judgment before such reconveyance seizes and sells the land as the property of the assignor, the better practice is not to set aside the sheriff's sale at the instance of the other judgment creditor, but to permit the acknowledgment of the sheriff's deed and leave the rights of the judgment creditors to be settled by an action of ejectment.

It seems also that after the payment of all the debts secured by an assignment for the benefit of creditors, land remaining unsold is subject,

without reconveyance to execution on judgments entered against the assignor after the date of the assignment.

(Argued May 26, 1887. Decided October 3, 1887.)

July Term, 1887, No. 75, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of Juniata County to review a judgment setting aside a sheriff's sale of real estate in execution. Writ quashed.

On December 1, 1874, Samuel Leonard executed and delivered a deed of assignment for the benefit of his creditors to Reuben Leonard, who assumed the duties of the trust. Elizabeth, wife of Samuel Leonard, did not join in the execution of this deed.

The property assigned consisted of both personal and real estate and greatly exceeded in value the amount of the debts. The debts existing at the time of the assignment were all paid by the assignee out of the proceeds of the personal property and the income of the land; and he accounted for enough money in his last account to leave a balance in his hands after payment of all the indebtedness existing at the date of the assignment, of $365.08.

On August 16, 1877, a divorce *a mensa et thoro* was granted Elizabeth Leonard, with alimony at the rate of $240 per year, upon the ground of desertion. On October 22, 1878, Reuben Leonard entered a judgment against Samuel Leonard for $1,065.79, the money represented by this judgment having been loaned after the deed of assignment was made.

Reuben Leonard, after the payment of all the debts of Samuel Leonard, contracted before the assignment, issued execution on his judgment and sold a tract of land included in the assigned estate, himself becoming the purchaser for $182.

Elizabeth Leonard, the divorced wife of Samuel Leonard, who was interested only because she was a creditor for alimony, filed exceptions to the confirmation of the sale, and it was set aside by the court below, upon the ground that as neither debt was a lien at the date of the assignment, and the assignee had not reconveyed the land to the assignor (which the court held necessary under the act of May 4, 1864), the lien of neither debt could attach to the land, and that, therefore, the land could not be taken and sold in execution of the judgment.

Reuben Leonard, thereupon, took this writ.

The assignment of error specified the action of the court in setting aside the sheriff's sale.

Atkinson & Jacobs, for plaintiff in error.—The judgment of Reuben Leonard when entered was a lien on all the interest that Samuel Leonard had in the land sold, and a reversionary interest was secured to him by the deed of assignment itself.

A judgment is a lien on every kind of an equitable interest in land vested in the debtor, at the time of its entry. Clarkhuff v. Anderson, 3 Binn. 4; Pugh v. Good, 3 Watts & S. 56, 37 Am. Dec. 534; Williams v. Downing, 18 Pa. 60; Lynch v. Dearth, 2 Penr. & W. 101.

The estate of a trustee is only commensurate with the purposes of the trust and ceases where there are no further duties to perform. The legal estate vests without conveyance. Westcott v. Edmunds, 68 Pa. 37; Bacon's Appeal, 57 Pa. 504.

Whenever the entire beneficial interest is in the *cestui que trust,* without restriction as to the enjoyment of it, there is no reason why it should not be considered as actually executed. No formal conveyance of the legal estate is necessary, although it will be decreed because the nominal trust beclouds the title and embarrasses the rights of alienation, which belong to the true owner. Rife v. Geyer, 59 Pa. 396, 98 Am. Dec. 351; Kay v. Scates, 37 Pa. 40, 78 Am. Dec. 399; Yarnall's Appeal, 70 Pa. 335, and Ogden's Appeal, 70 Pa. 501; Enderiss v. Harkness, 3 W. N. C. 366, and Harkinson v. Bacon, 3 W. N. C. 403.

A voluntary assignment, by a debtor in failing circumstances, to a trustee for the benefit of creditors, does not depend for its validity upon any statute, and the acts of assembly which have been passed to regulate it are no parts of the insolvent laws. Beck v. Parker, 65 Pa. 262, 3 Am. Rep. 625.

A purchase by a trustee is not absolutely void, but voidable merely at the election of the *cestui que trust,* or those beneficially interested in the estate. Fisk v. Sarber, 6 Watts & S. 21; Musselman v. Eshleman, 10 Pa. 394, 51 Am. Dec. 493, 2 Wms. Exrs. 938, note H, top page 1005.

Golden's Appeal, 110 Pa. 581, 1 Atl. 660, was a case in which creditors were prejudiced by a reconveyance to the assignor; this is a case in which there are no creditors who were interested in the assignment and no reconveyance, the trust having been fully executed by the assignee.

The act of May 4, 1864, provides that the court "may order and direct the assignee to reconvey to the assignor," but it is not compulsory.

An order setting aside an execution is not a matter of discretion with the court below, but a judgment with which persons may find themselves aggrieved within the act of May 22, 1722, relating to writs of error and appeals. Pontius v. Nesbit, 40 Pa. 309.

And a writ of error lies (Jackson v. Morter, 82 Pa. 291); though an appeal does not (Young's Appeal, 2 Penr. & W. 380; Hoffa's Appeal, 82 Pa. 297).

Robert McMeen, for defendant in error.—A judicial sale is a contract with the court, made as a part of a remedial process; and the court has power over such contracts in analogy to the control which it has over other parts of its proceedings. Cummings's Appeal, 23 Pa. 511.

The decision of the court of common pleas confirming a sheriff's sale, and ordering the acknowledgment of the deed to the purchaser, cannot be the subject of a writ of error. Rees v. Berryhill, 1 Watts, 263; Sloan's Case, 8 Watts, 194.

It does not appear from Jackson v. Morter, 82 Pa. 291, that error lies from the judgment of the court of common pleas setting aside a sheriff's sale.

The judgment of Reuben Leonard could not become a lien upon the equitable title, until the trusts set out in the deed of assignment were all fully performed.

The execution was not set aside by the court.

An assignee is the debtor's instrument for distribution, and stands in relation to the property as stood the debtor himself, except that it cannot be seized in his hands on a creditor's execution. Vandyke v. Christ, 7 Watts & S. 375; Twelves v. Williams, 3 Whart. 485, 31 Am. Dec. 542; Bullitt v. Chartered Fund of M. E. Church, 26 Pa. 111; Mellon's Appeal, 32 Pa. 129.

Where one enables himself to become a purchaser of lands at a sheriff's sale by the commission of a fraud, no title vests in him by the sheriff's deed; and the former owner of the land may recover the same in ejectment without offering to refund to the purchaser the money which he has paid to the sheriff. Gilbert

v. Hoffman, 2 Watts, 66, 26 Am. Dec. 103; Foulk v. M'Farlane, 1 Watts & S. 297, 37 Am. Dec. 467.

In Golden's Appeal, 110 Pa. 581, 1 Atl. 660, Mr. Justice Sterrett says: "Voluntary assignments for the benefit of creditors are so regulated by statute and governed by principles of equity that, when duly executed and delivered, neither the assignor nor his assignee nor both together can defeat the trust thereby created in favor of creditors. . . . Equity will not suffer the trust thus created to fail by reason of the misfeasance or nonfeasance of the trustee named in the deed, because a trust, unlike a naked power, is ever imperative and binding on the conscience of the agent appointed to execute it; and if he refuses or neglects to do his duty, a chancellor will either compel him to perform it, or substitute another hand to uphold the trust and carry it into effect."

Per Curiam:

While we do not by any means approve the reasons given by the learned judge of the court below for setting aside the sheriff's sale, and think it would have been better to allow the acknowledgment of the sheriff's deed, and thus permit the judgment creditor to have tested his right by an action of ejectment, yet as the court, in setting aside the sale, did but exercise its lawful discretion, we cannot review that discretion on a writ of error.

The writ is quashed.

Benjamin T. Taylor, Plff. in Err., *v.* Jacob Breisch et al.

The defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation.

In an action upon a promissory note, to the payment of which the balance of collateral, a note of the defendant held by a third person, has been appropriated, the defendant cannot avail himself of the payment of usury upon the other note to reduce its amount and increase the balance of collateral available as a set-off against the note in suit.

(Argued April 19, 1887. Decided October 3, 1887.)

Note.—The giving of a new bond will not prevent the claiming of credit for the usurious bonus paid in consideration of the original loan. Blymyer v. Colvin, 127 Pa. 114, 17 Atl. 865.

January Term, 1886, No. 279, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, GREEN, and CLARK, JJ. Error to the Common Pleas of Schuylkill County to review a judgment on a verdict for the defendants in an action of debt. Reversed.

This was an action of debt by Benjamin T. Taylor against Jacob Breisch and others, trading as Jacob Breisch & Company, on two promissory notes: one for $4,000, dated February 17, 1874, the other for $1,832.77, dated January 21, 1874, given in renewal of notes for the same amounts, dated respectively November 22, 1871, and August 13, 1873—made by Jacob Breisch & Company, the former to the order of Adam Breisch, one of the partners, and indorsed first by him and then by all the other partners individually, the latter made by the same firm to the order of Henry Breisch, another partner, and indorsed first by him and then by all the other partners individually.

At the trial before BECHTEL, J., the following facts appeared:

The plaintiff was treasurer of the Pottsville Life Ins. & Trust Company, afterward known as the Mechanics Safe Deposit Bank. Before the notes in suit were made the trust company or bank had been discounting the paper of Jacob Breisch and Jacob Breisch & Company. On June 17, 1870, Jacob Breisch assigned to the company certain securities as collateral for the payment of any paper which it then held or might thereafter hold, upon which he was either indorser or maker.

On November 22, 1871, Breisch indorsed on this assignment the further agreement that Taylor might hold the same securities as collateral or payment for any notes held by Taylor on which Breisch was liable. The original assignment of securities to the company was intended for and served as collateral for the payment of a note for $3,500 made by Jacob Breisch & Company and held by it November 22, 1871, and unpaid at the trial. On this note the company had received from Jacob Breisch & Company usurious interest. The defendants claimed to set off against the two notes in suit the collateral which would remain after deducting from the total collateral the amount necessary to pay the note for $3,500, and for the purpose of establishing the amount necessary to pay that note introduced, under objection and exception by the plaintiff, the testimony necessary to prove the usurious interest and its amount (First assignment of error); and thus reduced the amount due upon the note for $3,-

500 to such a point as to show a balance sufficient to wipe out so much of the claim upon the notes in suit as was not disputed on other grounds.

The defendants submitted, *inter alia,* the following point:

"1. That the $3,500 note, first made June 18, 1870, is the only note held by the bank up to and before the 22d of November, 1871; that the proper way of getting at the amount due on that note is to deduct from the same all sums paid thereon in excess of the legal rate of interest at the several renewals of said note, and when the amount unpaid of said note is ascertained, the jury may set aside so much of the fund from the collateral securities as is necessary to satisfy the amount due on said note."

Ans. "To this we say, what notes the bank held on the 22d of November, 1871, or prior thereto, you must ascertain from all the evidence. With this explanation we affirm this point." (Second assignment of error.)

The court charged the jury, *inter alia,* as follows:

"In ascertaining the amount due upon the papers the trust company held against Breisch, and for which it held the collaterals under the writing of June 14, 1870, you must deduct all payments which were made upon those securities, and this would include any illegal interest paid by Breisch to the trust company or to the bank. After doing this, whatever balance remains, being the balance arising from papers held by the bank, upon which Breisch was maker or indorser, such balance would carry legal interest to the time of the applying of the proceeds of the collateral." (Third assignment of error.)

Verdict and judgment for the defendants.

Charles W. Wells and *Guy E. Farquhar,* for plaintiff in error. —In Pennsylvania, under the existing interest law, it is not a crime for a creditor to demand and receive from a debtor interest at a usurious rate. The payment and receipt of usury is today just as legal as the payment and receipt of nonusurious interest. Miners' Trust Co. Bank v. Roseberry, 81 Pa. 313; Second Nat. Bank's Appeal, 85 Pa. 528.

The bank had a perfect right to receive the usury which it did from Breisch, and to keep it. It was not payment *pro tanto* when paid; and its payment can be taken advantage of only in an action to recover it back or by a defense to an action on the

principal debt. No such advantage can be taken in any collateral proceeding.

If this suit were by the bank itself, the defendants would have no right to set up as defense herein the usury paid by them on the other series of notes held by the bank. Maher's Appeal, 91 Pa. 516; Bright v. Mountain City Bkg. Co. 3 Pennyp. 478.

Much stronger is the case of an entire stranger, whose only connection with the claims of the bank upon the prior notes is that of the possession of a common security in which the bank has the priority.

A second mortgagee, in distribution of the proceeds of a mortgaged property, cannot set up the usury paid to the first mortgagee in payment of that mortgage, in whole or in part. Second Nat. Bank's Appeal, 85 Pa. 528, practically overrules Greene v. Tyler, 39 Pa. 361—a case under the old interest law.

At that time the taking of more than 6 per cent interest was unlawful, and subjected the lender to a penalty. It is not so now. Act of May 28, 1858, P. L. 622; Lennig's Appeal, 93 Pa. 301; Wheelock v. Wood, 93 Pa. 298.

B. B. McCool, James Ryon, and *John W. Ryon* for defendants in error.

Opinion by Mr. Justice Green:

The assignments of error in this case raise but the one question whether the direction to deduct the usury paid on the $3,500 note was correct. It is not proposed by the defendants that the usury upon that note shall be deducted from the notes in suit; and therefore the question is not precisely the same as that presented in the cases cited in the argument.

But the $3,500 note does not belong to the plaintiff; at least there is no legal identity of the plaintiff with the ostensible owners of that note. How then can the rights of such owners be determined in the present action to which they are not parties? How can we know that they may not have some reply to the defense of usury against their note? They are not in court, they cannot be heard, and of course their rights cannot be determined. The defendants cannot be prejudiced, because their right to defend upon the ground of usury is always available to them, whenever any action shall be brought upon the $3,500 note. But for the purposes of the present case we must be bound to regard that

note as a distinct and independent transaction from the notes in suit, and therefore not open to a judicial determination of an allegation of usury against its owners on the trial of this action.

All our recent decisions are to the point that a defense of usury against one obligation cannot be set up against an action upon an entirely distinct and independent obligation, even if it be between the same parties, much less can it be done where the parties are not the same. Bright v. Mountain City Bkg. Co. 3 Pennyp. 478; Maher's Appeal, 91 Pa. 516; Second Nat. Bank's Appeal, 85 Pa. 538; Leanig's Appeal, 98 Pa. 301.

The assignments of error are sustained.

Judgment reversed and new *venire* awarded.

James Quinn, Plff. in Err., *v.* Commonwealth of Pennsylvania.

Where a count in an indictment has been abandoned at the trial, all evidence relating thereto will be excluded as irrelevant.

In a prosecution for forcible entry and detainer, the force and threats made at the time of the arrest of the parties are not evidence of a previous forcible entry and detainer; but after evidence of such previous force has been produced, it may be shown that when the officer went on the land the same parties were in possession, and how they were prepared to keep the same.

Tax receipts and assessments are not evidence of actual possession, but they may be used to strengthen other evidence of actual possession, as may also the evidence of a witness who bought sand from this land and paid the alleged possessor therefor.

Where a jury, after a fair presentation of the evidence, has found a defendant guilty of forcible entry and detainer, there is no error in awarding restitution of the possession illegally taken and withheld.

(Argued April 28, 1887. Decided October 3, 1887.)

January Term, 1887, No. 45, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Quarter Sessions of Northumberland County to review a judgment on a verdict of guilty, in an indictment for forcible entry and detainer of a certain island in the West Branch of the Susquehanna River known as Jenkin's Island. Affirmed.

The indictment contained three counts. The first count charged James Quinn, Silas H. Wynn, Charles H. Williams, Ea-

fayette Williams, and Jacob Lyon with the offense of forcible entry and detainer of an island in the west branch of the Susquehanna river, containing 5 acres and 45 perches.

The second count charged that the said parties, with force and arms, etc., entered into that certain tract of land, situated in Point township, county of Northumberland, being all that certain island situated in the west branch of the Susquehanna river, a short distance below the Chillisquaque creek, and being the first island below the Chillisquaque creek, containing 5 acres and 45 perches, being the property of, and in the peaceable possession of, Alfred Kneass.

It further charged that defendants with force and arms, etc., did expel and put out the said Alfred Kneass from the possession of the said messuage and then and there, with force and arms, etc., kept him from the possession of the same.

The third count describes the island in the same way, and alleges the possession in the prosecutor, and also alleges that he was seised of a freehold as tenant by the curtesy.

At the trial, before ROCKAFELLER, P. J., the commonwealth elected to try on the second and third counts, and produced evidence to show possession of the island in James Jenkins in 1786, and a continuous possession since that time in his heirs and successors.

Alfred Kneass, the prosecutor, testified that Quinn had secretly gone upon the island and built a shanty upon it, which he (Kneass) tore down; that Quinn returned and put up another shanty which was also destroyed, and that then Quinn went for the third time upon the island with several armed men and refused to leave.

Counsel for the commonwealth offered to show by the witness on the stand, Alfred Kneass, that the next day after he (witness) had led Quinn, the defendant, down to the edge of the island and he refused to go, witness went to Northumberland and made an affidavit, upon which the warrant of arrest was issued for the forcible entry and detainer; that he went back to the island, found Quinn there and a number of others, who violently resisted the arrest, both himself and his men showing weapons and pistols, and that he violently resisted the constable in making the arrest.

This was offered for the purpose of showing the intent of the defendant, and to interpret his conduct when witness was upon the island on the previous occasions referred to, and to show that

he would have resisted, and that he intended to keep the island by force; also, as explanatory of the conduct of the defendant, and to show the motive which actuated him the day before. Objection.

By the Court: "The commonwealth has shown that on some day last winter, a year ago, the prosecutor went upon the island in question, and found the defendant and seven or eight men there; that the defendant, upon request, refused to go off, and that the prosecutor did not put him off, because he could not do so without using force himself and injuring him. It is now proposed to show what took place the next day, after the warrant of arrest was issued. I am of opinion that the evidence, as to the force used to detain the property, must be confined to what took place previous to the commencement of the proceedings, and that any force or threats made after proceedings were commenced, that is, at the time the officer went there to arrest the defendant, are not evidence of previous forcible entry or detainer. But I am of the opinion that the commonwealth may show that when the prosecutor and officers went there, they found the same men there that were there the day before, at the time of the alleged forcible detainer, and what they had with them in the way of arms, and how they were prepared to resist an attack, etc. This, to show the defendant's acts and intentions at the time of the alleged forcible detainer. So far the commonwealth may go and both parties except." (Third assignment of error.)

Counsel for the commonwealth offered to show by the witness on the stand, John A. Gundy, that he bought sand from Mr. Kneass; that he hauled it off of the island himself and paid Mr. Kneass for it; that when the contractors who were building the road over there came there to buy sand he referred them to Mr. Kneass; that afterwards there was a bill sent to him for collection for sand sold in that way and that he collected the same from the contractors and paid the money over to Mr. Kneass.

This for the purpose of showing possession of these premises in Mr. Kneass. Objection.

By the Court: "So much of the offer as tends to show that the prosecutor, Kneass, used the island for the purpose of getting and selling sand every year, as testified to by him, is admitted. So much of the offer as merely proposes to show that witness told certain contractors as to where they could get sand and that he afterwards collected a bill for sand from said contractors for

Kneass is rejected, as incompetent." (Fourth assignment of error.)

Counsel for the commonwealth also offered to show by the tax books the assessment of taxes upon a piece of land in Point township, Northumberland county, in possession and ownership of the Jenkins family, and to follow it on down with assessments in the name of Col. Alfred Kneass, the prosecutor, to this day—this for the purpose of showing these taxes were assessed against the heirs, and that they paid them on this island, from that day to this. Objection.

By the Court: "Assessment and payment of taxes alone would not be evidence of ownership or possession. But on a question of possession we think, after evidence of actual possession has been given, that the prosecutor may show in connection therewith, that he paid taxes regularly assessed thereon. The objections are overruled, the evidence admitted, and the defendant excepts." (Fifth assignment of error.)

Defendant's counsel offered to read in evidence a deed from John Penn, Jr., and others to John Louden, recorded in Deed Book 89, pp. 216, 217, for the purpose of showing that this is the same deed contained in the first count of the indictment.

This is to be followed by evidence that this is the island that was first known as Jenkins' island, after that as Shannon's island, and subsequently as Kneass's island and that the island now in dispute is not the island described in this deed. Objection.

By the Court: "If the commonwealth was seeking conviction under the first count in the indictment, the deed would be evidence; on a trial under the other counts it is not evidence and is rejected. The defendant may show that the island in dispute and described in the indictment is not the island mentioned by the witnesses; that was called 'Jenkins' island,' and afterwards 'Shannon's island,' and still later, 'Kneass's island.'" (First assignment of error.)

It was admitted by the counsel for the commonwealth, that a paper marked "C" September 10, 1885, is a copy of the answer made by Kneass to the application of James Quinn, when he applied to have the island in dispute surveyed on a warrant.

Defendant's counsel offered in evidence this paper to show what the title then set up by Kneass against Quinn was on a warrant dated November 29, 1768, surveyed May 3, 1776, under

the proprietaries of Pennsylvania for an island nearly opposite Chillisquaque creek in the county of Northumberland, containing 5 acres and 45 perches, and that that is the same island testified to by the surveyors, Mr. Searles and George Burns, as being located immediately above Chillisquaque creek.

This was offered as evidence that the island in dispute is not the one used by Mr. Kneass, and claimed by him before the board of property. Objection.

By the Court: "For the purpose offered the evidence is immaterial and is therefore rejected. The defendant excepts and bill sealed." (Second assignment of error.)

The defendant submitted, *inter alia,* the following points:

5. In the second count of the indictment the commonwealth does not aver a title in Alfred Kneass the prosecutor; the only allegation is a naked possession which is insufficient in law to sustain a verdict of guilty and an award of restitution, as ruled by the supreme court of Pennsylvania in the case of Burd v. Com. 6 Serg. & R. 252, therefore the verdict should be not guilty.

Ans. I do not affirm this point. If there is a conviction, the question of awarding restitution may then arise. (Sixth assignment of error.)

6. The third count of the indictment avers an estate in the prosecutor as tenant by the curtesy, referring to an island of five acres and forty-five perches. According to the evidence in the case the wife of Alfred Kneass never had the actual possession of the island in dispute so as to acquire a title to the same; that in the absence of a title in the wife before her death the husband cannot become tenant by the curtesy and for that reason there can be no conviction on this count.

Ans. This point is not affirmed. See general charge. (Seventh assignment of error.)

7. If the jury believe from all the evidence in the case that Alfred Kneass, the prosecutor, was many years ago in the actual possession of the island in dispute, and left it without leaving some evidence upon the premises which would indicate or give notice of his intention to return, abandonment would be presumed according to the doctrine laid down by the supreme court in Burke v. Hammond, 76 Pa. 172, and the verdict of the jury should be not guilty; that the occasional taking of sand would amount to the casual observer to a mere trespass, nor would the payment of taxes be such evidence.

Ans. This is so, but still I refer the jury to what I have stated in the general charge as to the evidence of possession in the prosecutor. (Eighth assignment of error.)

The court left to the jury the question of possession and the forcible entry and detainer.

Verdict, guilty in the manner and form as indicted in the second and third counts; defendant was accordingly sentenced to pay a fine and the costs, and also to make restitution.

The assignments of error specified the action of the court upon the questions of evidence above noted, the answers to the points and the sentence.

S. B. Boyer, for plaintiff in error.—If the deed had been admitted in evidence, which we proposed to introduce, and followed with other evidence that would have shown to the jury that the island now in dispute was not the one described in the second and third counts of the indictment, and that the framers of the bill intended it for the island mentioned in the deed and *caveat,* because it mentions in the second and third counts 5 acres and 45 perches.

The evidence relating to the conduct of Quinn and his men the day before the arrest did not amount to a violation of the law; objection to the evidence and purpose has been vindicated by what we have said; and the admission of the evidence was a fatal error to the defendant.

Taking sand, without anything else, in the nature of acts of ownership, such as fencing, cultivation, etc., was incompetent for the purpose of title by possession.

According to the doctrine in Burke v. Hammond, 76 Pa. 172, an occasional invasion to take sand would amount to a mere trespass; and the payment of taxes, without such acts of dominion as indicated in that case, would not raise a presumption of ownership.

As early as 1820, GIBSON, J., said, in Burd v. Com. 6 Serg. & R. 252: "In the first count of the indictment, there is not any estate or interest laid in Robert Woodcock, and nothing but a naked possession, which is insufficient to authorize an award of restitution." See also Com. v. Toram, 2 Pars. Sel. Eq. Cas. 411; and Respublica v. Campbell, 1 Dall. 354, 1 L. ed. 173.

The averment in this indictment is nothing more or less than

the averments in 6 Serg. & R. 252; 2 Parsons, 411, and 1 Dall. 354, and neither of them was held to be good.

The third count avers that Kneass was seised as tenant by the curtesy of England, of and in all that certain, etc., and that he, the said Kneass, had an estate for life, in and during his natural lifetime, etc.

A tenant by the curtesy is a species of life tenant, on the death of his wife seised of an estate of inheritance, after having issue by her, etc., Co. Litt. 29 a.; 2 Bl. Com. 126; but to consummate the tenancy the marriage must be lawful, the wife must have possession, and not a mere right of possession, etc. It is an estate to which a man at common law is entitled on the death of his wife. 1 Washb. Real Prop. 127; 2 Bl. Com. 126.

Taking the whole evidence in the case, commencing with the deed rejected, which shows, beyond any doubt, that the prosecutor's title was disclosed in the first count of the indictment, the *caveat* filed by him to the application of Quinn for a warrant, recited it, and upon that title the warrant was refused, it is evident that Kneass has no title to his island.

The use of an unseated tract of land as a wood lot is not an adverse possession to bar an action of trover for wood cut from it; and it is consequently not an adverse possession to give effect to the statute of limitations. Sorber v. Willing, 10 Watts, 141; Wright v. Guier, 9 Watts, 172, 36 Am. Dec. 108.

The occasional cutting of timber and boiling of sugar on the land in dispute by the occupier of an adjoining tract, and the extension of his lines so as to include a small portion of the meadow land, is not such possession as will give title under the statute of limitations. Washabaugh v. Entriken, 34 Pa. 74.

The payment of taxes on unseated land is an *indicium* of ownership and, in connection with actual possession and cultivation, strong evidence of title; but it is not possession *per se,* such as gives title under the statute of limitations. Actual possession or cultivation of part of a tract of land used of the uncleared portion as wood land, and payment of taxes on the whole for twenty-one years, are circumstances which constitute title to the whole; but without possession or cultivation of part of the tract, entries from time to time to take wood are mere trespasses, and confer no right, even when accompanied by payment of taxes. Murphy v. Springer, 1 Grant Cas. 73.

As to what is necessary to constitute forcible entry, etc., see

Burke v. Hammond, 76 Pa. 172; Com. v. Keeper of Prison, 1 Ashm. (Pa.) 140; Com. v. Conway, 1 Brewst. (Pa.) 509; and Com. v. Rees, 2 Brewst. (Pa.) 564.

P. A. Mahon, Dist. Atty., *J. Merrill Linn,* and *John H. Vincent,* for defendant in error.—In an indictment for forcible entry, neither the right nor the right of possession come in question, but the possession only, and the force. Addison, 15.

The title is not in issue. Whart. Crim. Law, § 2044.

Even when the entry is lawful it must not be made with a strong hand—if unlawful it must not be made at all. Id. § 2033.

When the entering party has no right of entry, all persons accompanying him are guilty. Id. § 2037.

A forcible entry is where a person enters into lands or tenements *manu forti;* as, if he brings unusual weapons, if he assembles an unusual crowd of men or uses a greater quantity of arms than is usual for protection. It does not alter the case that no one is within the house. Chitty, Crim. Law, *1120.

Evidence to sustain detainer—keeping in the place an unusual number of people, or unusual weapons. Wharton, Crim. Law, § 2041.

The offense of forcible entry is complete at the entry, but the detainer only ends when possession is surrendered; and hence there is a decree of restitution upon conviction. "The restitution is the principal reason for indicting." Chitty, Crim. Law, *1122.

The attitude of the parties when they were arrested for the substantive offense they were committing, detainer, is evidence.

There can be no higher act of domain than the selling of the very soil itself, and the payment of taxes militates against the idea of abandonment.

The estate is here alleged "the property of, belonging to." In Bard v. Com. it was said that the statement, "into the dwelling house of," was a sufficient description or laying of estate; and in the third count it is described as the life estate, tenancy by curtesy, and the jury found the facts on both the counts. Words not appropriated to real estate, such as "property," in modern times are adjudged sufficient. They are common terms employed in the conveyances of land. Harper v. Blean, 3 Watts, 454, 27 Am. Dec. 367.

The evidence was properly submitted to the jury. The place was occupied as any other field of the farm. The approach was by stealth, with an unusual force of men and arms, without a shadow of title, trees and bushes destroyed and a cabin built, which is sufficient force. Chitty, Crim. Law, *1120.

OPINION BY MR. JUSTICE STERRETT:

The commonwealth elected to go to trial on the second and third counts of the indictment drawn under §§ 21 and 22 of our Penal Code. Evidence tending to sustain the material averments of each count was adduced and submitted to the jury under instructions which appear to be substantially correct. The result was a verdict of guilty on each count and judgment thereon.

If the commonwealth had elected to proceed on the first count, the deed referred to in the first specification might have been relevant; but as the issue was presented on the remaining counts it was rightly excluded as irrelevant. The defendant was permitted to show, if he could, that the island in dispute and described in the indictment is not the island mentioned by the commonwealth's witnesses. On that branch of the case he had no right to anything more.

The paper referred to in the second specification was also rightly excluded as irrelevant and incompetent.

The evidence referred to in the third, fourth, and fifth specifications was not incompetent or irrelevant for the purposes for which it was received. It had some bearing on the questions of fact involved in the issue,—*viz.*, whether the prosecutor had such possession of the island in question as the law recognized as sufficient, and whether he was put out or kept out of possession by force, threats or menacing conduct of defendant. In connection with other testimony in the case, the evidence complained of was not improper for the consideration of the jury.

There is no error in either of the answers to defendant's points referred to in the sixth, seventh, and eighth specifications, respectively. As explained and qualified, by reference to the general charge, the answers complained of were neither erroneous nor misleading.

The remaining specifications of error are not sustained. The evidence presented questions of fact which it was the exclusive province of the jury to consider and determine; and having

found the defendant guilty on the second and third counts, there was no error in awarding restitution of the possession illegally taken and withheld.

Sentence affirmed.

GORDON, Ch. J., dissents.

R. A. Dempsey, Assignee for the Benefit of the Creditors of Huff Bros. & Company et al., Plffs. in Err., v. M. A. Harm, to the Use of S. G. Slike.

Dealing in margins is a gambling transaction which a court of justice will not sustain.

The assignment of a certificate of deposit to a broker as collateral security for margins in oil renders the broker merely the bailee of the assignor.

A certificate of deposit not being a negotiable instrument the transferees of the original parties must depend on the equities of those from whom they claim title, unless they have some new and independent equity of their own.

Cited in Durr v. Barclay, 8 Pa. Co. Ct. 285.

NOTE.—In Pennsylvania the rule that every wagering contract is void (Pritchet v. Insurance Co. [1803] 3 Yeates, 458); and that no action can be maintained by the winner for the recovery of an unpaid wager (Phillips v. Ives, 1 Rawle, 36; Edgell v. McLaughlin, 6 Whart. 178, 36 Am. Dec. 214); or even by a bona fide holder of a promissory note given for such wager (Harper v. Young, 112 Pa. 419, 3 Atl. 670); although the loser may, under some circumstances, recover his wager from the stakeholder (App v. Coryell, 3 Penr. & W. 494; Conklin v. Conway, 18 Pa. 329; Forscht v. Green, 53 Pa. 138; M'Allister v. Hoffman, 16 Serg. & R. 147, 16 Am. Dec. 556),—is strictly applied to dealing in "margins" and wagers upon the prospective prices of stocks, bonds, oil, grain, etc.

"A wager," said Judge HARE in Fareira v. Gabell, 89 Pa. 89, "may be defined as a contract in which the parties stipulate that they shall gain or lose upon the happening of an uncertain event in which they have no interest except that arising from the possibility of such gain or loss. . . . But it does not follow that every contract which produces such a result is a wager; the question is one of intention as deduced from the facts and circumstances.

Accordingly, no recovery can be had by an indorser after maturity, upon a note given in settlement of the maker's loss, by "selling short" certain stocks to the payee, without an intention actually to deliver the same. Brua's Appeal, 55 Pa. 294 (1867).

In an action by the assignee of one to whom the payee first assigned a certificate of deposit against the maker, who is the subsequent assignee of the payee, the defendant may show as a defense that the certificate was assigned by the payee to the plaintiff's assignor as collateral security for the payment of a gambling debt, or that the defendant was an innocent purchaser for value without notice.

Such a defense is a complete bar to the action unless the plaintiff was himself an innocent purchaser for value.

An assignment of error not founded on exception will not be considered.

Not decided whether, under the act of June 23, 1885, the panel in a civil action having been exhausted after sixteen jurors are called, the court may direct the sheriff to call talesmen from the bystanders.

(Argued May 10, 1887. Decided October 3, 1887.)

January Term, 1887, No. 166, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of McKean County to review a judgment on a verdict for the plaintiff in an action of assumpsit. Reversed.

The facts as they appeared at the trial before OLMSTEAD, P. J., are stated in the opinion.

The panel being exhausted after sixteen jurors were called, an order was made directing the sheriff to call talesmen from the bystanders. Defendants' counsel objected to the calling of talesmen, claiming that under the act of assembly of June 23,

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A judgment entered upon a bond and warrant to cover "margins," though a declaration of no set-off has been executed, will not be enforced in the hands of an assignee who had no knowledge of the declaration; Griffith's Appeal, 16 W. N. C. 249; or had notice of the character of the transaction. Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492.

In an action on a contract for future delivery, apparently lawful, for damages for failure to deliver oil when "called" according to the contract it is a good defense to show that the contract was made not with a bona fide intention to take the oil, but merely to settle differences (Kirkpatrick v. Bonsail, 72 Pa. 155); and a similar rule applies where the vendor is plaintiff in an action for damages for the purchaser's refusal to take oil according to contract (Scofield v. Blackmarr, 2 Sad. Rep. 544.

Where a broker advances money to carry on, for his client, a stock gambling operation he cannot recover the amount from his client. Fareira v. Gabell, 89 Pa. 89; Dickson v. Thomas, 97 Pa. 278.

If one lends money to another for the express purpose of having it used in speculation upon the rise and fall of prices, and the money is so used, the lender cannot recover it. He is *particeps criminis*. But mere knowledge that the money will be so used does not necessarily defeat his recovery; Waugh v. Beck, 114 Pa. 422, 60 Am. Rep. 354, 6 Atl. 923; the test is

1885, they have a right to twenty jurors called from the regular panel. Objection overruled and talesmen called. No exception. (First assignment of error.)

The jury having been sworn and the facts stated in the opinion having been testified to, Mrs. M. A. Harm was called as a witness, and testified as follows:

Q. You may state if you ever gave that certificate to one N. D. Preston?

A. I think I did.

Q. You may state what for?

A. For margins on buying oil. I gave it to him for margins on buying oil.

Q. What was the understanding with him at the time you gave it to him, about his returning it to you? What was the agreement between you at the time?

A. I think Mr. Preston said that if the market was in my favor he was to pay it back to me; and if not I don't know that anything was said about it. I don't think we talked about that. Brokers never talk about that part of it.

Q. How much did you owe him, if anything, at the time you gave him that certificate?

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whether the plaintiff requires the aid of the wagering contract to establish his case. Lloyd v. Leisenring, 7 Watts, 294; Scott v. Duffy, 14 Pa. 18. On the other hand money paid in settlement of differences or deposited by way of "margins" cannot be recovered (Merriam v. Public Grain & Stock Exchange, 1 Pa. Co. Ct. 478); although the rule is different in the case of an infant (Ruchizky v. De Haven, 97 Pa. 202); and an action cannot be maintained against a broker for violating an agreement to carry stocks on "margin" for a specified time (North v. Phillips, 89 Pa. 250).

Of course these cases are inapplicable to bona fide time contracts for the sale and delivery of stocks and other personal property. The character of every transaction is for the jury. Smith v. Bouvier, 70 Pa. 325; Maxton v. Gheen, 75 Pa. 166.

If the contract is void by virtue of the act of 1794, the check given is void. Durr v. Barclay, 8 Pa. Co. Ct. 285. Money held by a stakeholder as the result of a wagering contract may be withdrawn. Dauler v. Hartley, 178 Pa. 23, 35 Atl. 857. And a note given in payment is uncollectible. Gaw v. Bennett, 153 Pa. 247, 34 Am. St. Rep. 699, 25 Atl. 1114. But a bona fide indorsee and holder for value, without notice and before maturity, of a promissory note given in a stock gambling transaction may recover against the maker. Northern Nat. Bank v. Arnold, 187 Pa. 356, 40 Atl. 794.

A. I don't think I owed him anything. We were expected to keep a few cents of margins good.

Q. How much, if anything, did you owe him on the 18th of May, 1882 (the day Mrs. Harm transferred the certif. to Preston)?

A. I don't think I owed him anything. We were expected, as I say, to keep a few cents of margins good.

Q. State whether or not Mr. Preston ever offered to return the certificate to you?

A. No.

Q. After you had given him the certificate, did he call on you for any money prior to May 18, 1882?

Objected to as incompetent.

Offered for the purpose of showing that she complied with the conditions on which this certificate was given to Mr. Preston.

Objection sustained and evidence excluded. Exception. (Eighth assignment of error.)

The court charged the jury, *inter alia,* as follows:

"Mr. Preston testifies that Mrs. Harm, in the middle of May, 1882, indorsed this certificate and transferred it to him for a valuable consideration and delivered it into his possession, and that on the 20th of May, the same year, he sold and delivered it to S. G. Slike." (Ninth assignment of error.) . . .

"What interest did Preston acquire by the transfer to him by Mrs. Harm of the certificate about the middle of May, 1882? . . . Preston says in his direct examination that he became the owner of it by purchase from Mrs. Harm." (Eleventh assignment of error.) . . .

"Now, you would have no great difficulty from the evidence of this witness alone (meaning Preston) in arriving at the conclusion that Preston was the owner of the certificate." (Twelfth assignment of error.) . . .

"The jury should observe that while she (Mrs. Harm) testifies in a guarded way that she was not, as she understands it, indebted to him at the time of the assignment, she corroborates Preston in his allegation that the transfer was to indemnify him against loss by the falling of the price of oil, and that oil fell and she subsequently paid him other moneys in addition to this certificate to keep up the loss. Does she state or intend to state that she did not become indebted to him to the full amount of

this certificate by reason of the depreciation in the price of oil before she transferred her interest in the certificate to Huff and Ege? What is the fair conclusion from the testimony of Preston and Mrs. Harm on this question? Did not the full amount of this certificate become absorbed by the falling price of oil, and did not, as a consequence under the agreement between them, Preston become the owner of the certificate with full right to transfer it to Slike or bring suit upon it in his own name as he saw fit? If you find that he did, then, as we understand the case, the defendant has no defense and the plaintiff is entitled to recover the full $3,000 and interest." (Thirteenth assignment of error.)

Verdict and judgment were for the plaintiff for $3,720.

Morrison & Apple and *Brown & Roberts,* for plaintiffs in error.—The purpose of the act of June 23, 1885 (P. L. 138), was to call the full number of jurors that could be called, provided each party exhausted his challenges. It therefore enacted that twenty jurors should be called, and thus each could challenge with the certain knowledge that the jury would be composed of those left, and neither be subjected to the unknown caprice of him upon whom the duty of calling talesmen would devolve. By the plain terms of the act it is directed that the twenty jurors shall be drawn from the box containing the names of those summoned for that court, and that the jury thus drawn shall be the jury to try the cause. This being the last legislation upon the subject, and no provision being made for drawing talesmen, without the consent of both parties to the suit a jury could not be legally constituted, either in whole or in part, by calling men from among the bystanders.

The undisputed evidence in the case is that Preston held the certificate as collateral security for margins on oil, which he was pretending to carry, on a gambling contract made with Mrs. Harm. Under any view of the evidence, he at most only held the certificate as collateral security for performance on her part of their contract. This being so, he could not sell and dispose of it without notice, and settlement and demand for the differences from her. Edwards, Bailm. §§ 275, 279, 282, 286; Davis v. Funk, 39 Pa. 243, 80 Am. Dec. 519.

The rule is the same, although the debt is payable presently and without demand, and although by the terms of the pledge

the creditor may sell at public or private sale without notice. Wilson v. Little, 2 N. Y. 443, 51 Am. Dec. 307.

The consignee is bound to give notice of a decline and make an actual demand for the margins. Milliken v. Dehon, 27 N. Y. 364.

The holder of a collateral security cannot appropriate it in satisfaction of his debt at his own option. Sitgreaves v. Farmers' M. Bank, 49 Pa. 359; Diller v. Brubaker, 52 Pa. 498, 91 Am. Dec. 177; Conyngham's Appeal, 57 Pa. 474.

M. F. Elliott, R. Brown, and *D. H. Jack* for defendant in error.

OPINION BY MR. CHIEF JUSTICE GORDON:

On the 4th day of March, 1883, H. B. Huff and J. A. Ege, doing business as Huff Brothers & Company, executed to Mrs. M. A. Harm a certificate of deposit, payable with interest, in one year after date, in the sum of $3,000. Some time in May following Mrs. Harm transferred this certificate, as collateral security, to cover differences or margins in the purchase and sale of oil, to N. D. Preston, who in turn, on the 20th of the same month, assigned it to S. G. Slike, the plaintiff below. Again, on the 28th of June then next, Mrs. Harm, for an alleged valuable consideration, assigned all her right, title and interest, in and to the said certificate, to Huff Brothers & Company.

Now, the paper in controversy not being negotiable, the transferees of the original parties must depend upon the equities of those from whom they claim title, unless these transferees have some new and independent equity of their own. If, indeed, Slike was an innocent purchaser for value, and if of this fact Huff Brothers & Company had notice, he would as against them be entitled to recover at least the amount which he paid to Preston for the paper.

How then stand the original parties: Preston and Mrs. Harm? Clearly, if Preston is to be believed, he was a holder without consideration. He says: "She was to give me these certificates of deposit, and in case her oil rendered a profit I was to return the certificate of deposit, so that the interest should not be broken; and in case the market should decline to a place where the certificates were eaten up, it was to be my property. They were to become my property if they were

nearly taken up by the decline, and in case the oil rose I was to return her certificates. If oil advanced so that she could settle up, I was to give her money for her profit and give her certificates back again, which I had done on former occasions."

This was clearly gambling upon the price of oil; as he says afterwards a dealing in differences, which, as we have repeatedly ruled, is a transaction of such a nature as cannot be sustained in a court of justice. It follows that the court made a mistake in excluding the defendant's offer covered by the eighth assignment; for any and all evidence tending to show the real character of the transaction ought to have been admitted.

It was also error to instruct the jury that Preston had testified that Mrs. Harm had transferred the certificate to him for a valuable consideration, for his evidence shows very clearly that the consideration was illegal and void. Nor was it less erroneous to charge as follows: "Now, gentlemen, you would have no great difficulty, from the evidence of this witness alone, in arriving at the conclusion that Preston was the owner of the certificate." On the evidence "of this witness alone" the instruction should have been that Preston was not the owner of this certificate, but a mere bailee for Mrs. Harm.

What has been said sustains the eighth, ninth, eleventh, twelfth, and thirteenth assignments; the first, not being founded on an exception in the court below, we refuse to consider, and the others are not sustained.

The judgment is reversed and a new *venire* ordered.

John R. Kuhn et al., Plffs. in Err., *v.* Warren Savings Bank, Garnishee.

A claim of debtor's exemption is in time if made by the defendant at the filing of the garnishee's answers in an attachment execution, issued by a justice of the peace.

It seems that under the act of April 15, 1845, a justice of the peace who has jurisdiction over $100 may issue an attachment execution on a sum over $100.

It seems also that a bank which has been, as garnishee, served with an attachment execution covering the entire amount on deposit to the credit of the defendant has no right, as against the plaintiff, to pay a check given

bona fide and for valuable consideration by the defendant before the service of the attachment but not presented by the payeee until afterward.

But at all events a garnishee, having paid such a check, may be protected, even as against the plaintiff, by a claim of debtor's exemption duly made by the defendant, for an amount greater than the sum attached.

(Argued May 25, 1887. Decided October 3, 1887).

January Term, 1887, No. 367, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, and CLARK, JJ. Error to the Common Pleas of Warren County to review a judgment for the garnishee in a case stated. Affirmed.

This was originally an action by J. R. Kuhn *et al.*, trading as J. R. Kuhn & Company against G. T. Pryor and S. E. Bickel.

The facts as they appeared from the case stated for the opinion of the court below were as follows:

On March 17, 1884, a judgment was obtained by the plaintiffs, before George O. Cornelius, Esq., J. P., of said county, against the defendants for the sum of $192.14 and costs, amounting now to $222.30 and costs.

October 27, 1886, an attachment execution was issued by the justice upon the judgment and on the same day was served upon the Warren Savings Bank as garnishee. October 28 the attachment was served on the defendant, G. T. Pryor; but no service was made on Bickel.

On the same days interrogatories were issued and served on the garnishee, and on the defendant, Pryor.

Up to the date of the service of the attachment on the garnishee, there was on deposit with the garnishee to the individual credit of Pryor, the sum of $214.02; and there was no money on deposit to the credit of the firm of Bickel & Pryor or Bickel individually.

October 29, while said sum of $214.02 was still in bank a check dated, and given, October 23, 1886, bona fide and for good consideration, payable to the order of W. P. McMurtrie for $200, signed by Pryor, indorsed by McMurtrie to John Benner and by Benner to the Citizens National Bank, of Warren, was presented to the garnishee by the Citizens National Bank for payment and was paid.

The interrogatories were answered by the garnishee on the

4th day of November, and the answer was filed with the justice on said day.

The defendant when the answer was filed, gave notice to the garnishee of his claim to the benefit of the exemption act of April, 1849, which was duly set forth in the answer to the interrogatories. At the time of filing the answer, the justice told the garnishee and the defendant that the exemption could not be claimed for him by the garnishee; where upon the defendant's attorney, and the defendant claimed the benefit of the exemption act for the defendant and gave notice to the justice of said claim.

At the return of the attachment the plaintiffs did not appear, and nothing was done by the justice.

November 6 the plaintiffs appeared before the justice and asked for judgment against the garnishee; whereupon, the garnishee was notified to appear on the 15th day of November, at 3 P. M.; and upon that day the attorney for the plaintiffs and garnishee appeared, and the attorney for the garnishee claimed that the justice had no jurisdiction, for the reason that the amount involved in the attachment exceeded $100.

If the justice had jurisdiction to issue an attachment for said sum, and if, upon the foregoing facts, the court should be of the opinion that the plaintiffs were entitled to judgment, then judgment was to be entered in favor of the plaintiffs against the garnishee, for $214 and costs; otherwise, judgment for said garnishee and against said plaintiffs for costs, with right to a writ of error to either party.

Upon entering judgment for the garnishee, CUMMIN, P. J., filed the following opinion:—1. Had the justice of the peace jurisdiction in the attachment execution proceedings the amount in controversy being above $100?

The statute of April 15, 1845, P. L. 459 (Purdon's Digest, 999) whereby attachment execution process was extended to justices of the peace, contains no words limiting it to sums not exceeding $100, nor to any sum whatever. At the time this statute was approved the justices had no jurisdiction where the sum in controversy was not above $100; afterwards this was increased to $300. The statute extending this process to the justices is equally consistent with the $300 jurisdiction as it was with the $100.

In Jacoby v. Shafer, 105 Pa. 610, the enlarged jurisdiction

of justices of the peace was held to embrace proceedings by attachment relating to fraudulent debtors. For like reasoning, I am of opinion that it embraces proceedings by attachment execution.

2. As to irregularities in the proceedings before the justice of the peace: This case comes into court on appeal by which all irregularities are cured. The statute of March 20, 1810 (Purdon's Digest, 964), on this subject is as follows: "Provided, That upon any such appeal from the decision, determination, or order of two justices of the peace to the court of common pleas, . . . the cause shall be decided in such court on its facts and merits only, and no deficiency of form or substance in the record or proceedings returned, nor any mistake in the form or name of the action shall prejudice either party in the court to which the appeal shall be made."

3. Does the check given by the defendant to McMurtrie, bona fide and for a good consideration, October 23, 1886, operate as an equitable assignment *pro tanto* of the defendant's funds in the hands of the garnishee, in view of the facts that the attachment execution, at the suit of the plaintiffs, Kuhn & Company, was served on the garnishee October 28, 1886, and said check was not presented to the garnishee for payment until October 29, 1886, which was the first notice the (drawee) garnishee had of its existence?

The legal question here involved has been the subject of much controversy in the court. Many fine spun theories have been woven and hair splitting distinctions made; and, of course, by such processes it was hardly to be expected that uniformity could be reached. Fortunately, it will not be the duty of this court to attempt to bring harmony out of such discord.

The respective rights and duties of attaching creditors, garnishees, and check holders, under like circumstances, are reasonably well settled in adjudicated cases.

As to the check holders: In Saylor v. Bushong, 100 Pa. 27, 45 Am. Rep. 353, it is regarded as settled that the holder of a check cannot maintain an action in his own name against the drawees, though they have sufficient funds of the drawer, if they refuse to accept it. A check may be revoked by the drawer before presentment, etc.

As to the garnishee: THOMPSON, J., in Bank of Northern Liberties v. Munford, 3 Grant Cas. 232, declares: "It is true

a garnishee is bound to make every legal defense that a claimant of the fund might make."

As to the attaching creditor: An attaching creditor stands in the shoes of the debtor. Patten v. Wilson, 34 Pa. 299.

An attachment execution served, wherever it lies, places the attaching creditor in the same relation to the garnishee as that occupied by the debtor before the attachment was laid.

An attachment is an equitable assignment of the thing attached, a substitution of the creditor for the debtor and to the latter's right against the garnishee.

An attachment places a judgment creditor in the shoes of the debtor, with all his rights and privileges, just as he stood at the date of the service of the attachment. Reed v. Penrose, 2 Grant Cas. 472.

The rights of the respective parties must be ascertained as of the time when the attachment execution was served on the garnishee, *viz.*, October 28, 1886. On that day the garnishee had in its hands $214.02 of the funds of the defendant. On that day the attachment execution for $222.30 was served on the garnishee at the suit of the plaintiffs. This, by operation of law, worked an equitable assignment, as of that date, to the plaintiffs of all the defendants' funds in the hands of the garnishee, as the amount was less than the claim of the plaintiffs.

As the plaintiffs, the judgment creditors, on that day stood in the shoes of the debtor, defendant, with all his rights and privileges, of all of which the garnishee then had notice and was bound to know, the service of the writ on the garnishee was an appropriation, by operation of law, of the whole fund of the defendant in the hands of the garnishee to the claim of the attaching creditor. On that day the garnishee had no notice of the check previously given, and had in no way obligated itself to pay such check. The plain duty of the garnishee then was to hold the fund until the rights of the judgment creditors thereto could be adjudicated. But we are not without authority on the main question; after a collation of all the authorities this conclusion is arrived at in 2 White & T. Lead. Cas. in Eq. pt. 2, 4th Am. ed. p. 1653: "Agreeably to the weight of authority a check is, essentially, a bill of exchange, and will not, therefore, operate as an equitable transfer or appropriation."

In Jordan's Appeal, 10 W. N. C. 37, Mr. Justice STERRETT, delivering the opinion of the court, said: "It is well settled

that such a check or draft without more is neither a legal nor equitable assignment or appropriation of a corresponding amount of the drawer's funds in the hands of the drawee. It gives the payee no right of action against the drawee nor any valid claim to the funds of the drawer in his hands. If, before acceptance or payment of the draft, the drawer executes a voluntary assignment for the benefit of creditors, as was done in this case, the funds in the hands of the drawee pass by the assignment as assets of the insolvent's estate to his assignees in trust for creditors." See also cases cited in this opinion.

It seems clear, therefore, that in the case at bar the holder of the check has no sort of lien or claim of any kind on the funds in the hands of the garnishee, and therefore has no rights which need be considered in the further investigation of this case.

4. Is the defendant's claim for the benefit of the exemption law valid?

This question must be determined as of the time, and under the circumstances existing where the claim was made.

October 27, 1886, attachment execution issued. Same day served on garnishee.

October 28, 1886, attachment execution served on defendant. Same day interrogatories filed and served.

November 4, 1886, answers filed. Same day defendant claimed the benefit of the exemption laws and gave notice of his claim to the justice of the peace.

In an attachment execution, the defendant's claim of exemption relates, only, to what is attached in the hands of the garnishee. Landis v. Lyon, 71 Pa. 473.

An attachment execution was issued from a justice and a rule taken at the same time, on garnishee to answer interrogatories then filed. On the return day of the attachment the defendant claimed the $300 exemption, and the claim was in time. Yost v. Heffner, 69 Pa. 68. See also to same effect, Landis v. Lyon, 71 Pa. 473; Bittenger's Appeal, 76 Pa. 105; Howard Bldg. & L. Asso. v. Philadelphia & R. R. Co. 102 Pa. 220.

The amount attached in the hands of the garnishee was less than $300; so if the defendants' claim was a valid one, judgment should have been entered for the garnishee. The defendant had a right to make the claim, and he made it in a proper way and in proper time.

But it is claimed that the rule laid down in Bowyer's Appeal,

21 Pa. 210; Garrett's Appeal, 32 Pa. 160, 72 Am. Dec. 779; Shelly's Appeal, 36 Pa. 373, *viz.*: "That a debtor cannot waive his right to the $300 in favor of a junior lien creditor"—applies to this case, because the check holder has or may get this money in the hands of the garnishee if the defendant's claim for exemption is sustained. It seems to me there are many reasons why the rule just stated does not apply to this case. The check holder is not a party to this record; and in no event can the whole or any part of the fund in controversy be awarded to him in this case. The check holder is not a lien creditor; he has no lien or claim of any kind on the fund, nor has he any claim or right of action against the custodian of the fund, the garnishee. Nor is it of any importance, in determining the rights of the parties what the garnishee has done with the fund, as the unauthorized acts of the garnishee cannot prejudice or prevent the defendant's lawful claim for the benefit of the exemption.

When the justice entered judgment for the garnishee he thereby awarded to the defendant the benefit of his claim for exemption, and in this it seems to me he was clearly right.

The assignments of error specified the action of the court in entering the judgment.

Samuel T. Neill, for plaintiffs in error.—The attachment in this case issued upon a judgment for over $100 and the sum attached was in excess of $100. This was within the enlarged jurisdiction of the justice under the general act of July 7, 1879 (P. L. 194), extending the jurisdiction, under the act of 1810 and its supplements, to the sum of $300. The Erie County act of February 18, 1869 (P. L. 208), was extended to the county of Warren by act of February 29, 1872 (P. L. 190). This Erie County act extends jurisdiction under the act of 1810 "as fully to all intents and purposes" as given by act of 1810. All these acts in regard to the jurisdiction of justices are *in pari materia,* and part of one whole system. Jacoby v. Shafer, 105 Pa. 610.

As between the plaintiff and defendant an attachment is execution process. Sheaffer v. Wilson, 1 Chester Co. Rep. 161; Strouse v. Becker, 38 Pa. 190, 80 Am. Dec. 474.

It is the writ only that is to be served on the defendant. He has nothing to do with scire facias or interrogatories. 2 McKinney, Justice, 655, 669, 671.

The only provision in regard to answer is that garnishee shall answer within eight days after the same shall be served. All questions of irregularity are waived by the appearance and entering into agreement for stated case. The stated case also provides for a general judgment for plaintiffs, if entitled to it, and for the amount of it.

The proceedings of the justice in this case were regular. The attachment execution act does not require both the plaintiff and the garnishee to be present before the justice, when the interrogatories are to be answered, nor at the return day of the attachment; for there is no purpose to be served. Neither the garnishee nor the defendant are required to be present at that time. If the garnishee has been served, then interrogatories are issued and served on him to answer within eight days from service. The garnishee is not required to be present when he makes his answers, but can swear to his answers before another justice or other competent authority and send them to the justice.

The plaintiffs, by their attachment, acquired a lien against the funds of defendant in hands of garnishee, which, from time of service of attachment, were impounded and held in legal custody until determination of the attachment. Act of 1845, § 1 (Purdon's Digest, 999, pl. 125) referring to act of 1836 (Purdon's Digest, 746, pl. 39); Baldwin's Appeal, 86 Pa. 483.

There is no other lien or claim on said fund alleged to have been acquired upon that day. The service of an attachment execution has the effect of an equitable assignment of the thing attached; it puts the garnishee in the relation to the attaching creditor which he had sustained to his former creditor. Roig v. Tim, 103 Pa. 117.

It will prevail over an assignment for benefit of creditors made on same day. Boyer's Estate, 51 Pa. 432, 91 Am. Dec. 129.

The holder of the check of October 23 had no lien or claim upon the defendants' deposit in the bank until presentation and acceptance. It was a general check and not upon any particular fund. It was not presented until two days after the service of the attachment, and after the plaintiffs' right to the fund accrued, and seven days after its date.

An ordinary bill of exchange or check drawn generally and not upon any particular fund, whether accepted or not by the

drawee, does not operate as an equitable assignment. 3 Pom. Eq. Jur. § 1284.

A check for part of the drawer's funds constitutes no assignment of that part of such fund until presented for payment and accepted by the bank, although verbally assented to by the cashier when absent from the bank. Bullard v. Randall, 1 Gray, 605, 61 Am. Dec. 433; Ætna Nat. Bank v. Fourth Nat. Bank, 46 N. Y. 82, 7 Am. Rep. 314; National Bank v. Millard, 10 Wall. 152, 19 L. ed. 897; Carr v. National Security Bank, 107 Mass. 45, 9 Am. Rep. 6; First Nat. Bank's Appeal, 10 W. N. C. 37.

The holder of a check has no claim against the bank on which it is drawn and cannot maintain a suit against the drawee. Saylor v. Bushong, 100 Pa. 27, 45 Am. Rep. 353.

After an attachment execution has been served on a bank a check dated several days before but presented for payment on the same day is cut out by the attachment. Harry v. Wood, 2 Miles (Pa.) 327; Loyd v. McCaffrey, 46 Pa. 410.

The garnishee in this case cannot set up the claim of exemption for the debtor. Reed v. Penrose, 2 Grant Cas. 485; Fox v. Reed, 3 Grant Cas. 81; Jones v. Tracy, 75 Pa. 419; Yost v. Heffner, 69 Pa. 68.

It can only plead that which would be available against the defendant. Sergeant Attachm. 94; Jackson v. Bank of United States, 10 Pa. 67; Silverwood v. Bellas, 8 Watts, 420.

The question as to exemption is entirely irrelevant to this issue. The defendant has waived the exemption as to the second or junior creditor, the check holder, to whom he has transferred his right, and the result is that the fund, being released from operation of exemption law, goes to the creditors in the course of distribution required by law. Bowyer's Appeal, 21 Pa. 210; Shelly's Appeal, 36 Pa. 373; Garrett's Appeal, 32 Pa. 160, 72 Am. Dec. 779.

The bank had no right then to pay the check in the face of our lien for it was paying out money that legally belonged to the plaintiffs. Hartman v. Hartman, 4 Brewst. (Pa.) 393.

The exemption was claimed too late. A claim at the hearing on the return day of the attachment is too late. Morris v. Shafer, 93 Pa. 489; Rushworth v. Swope, 3 Legal Gaz. 223.

It is too late at the time of a plea to scire facias. Strouse v. Becker, 44 Pa. 206.

The claim should be made when process is served or within a reasonable time thereafter. Bair v. Steinman, 52 Pa. 423.

There was no fund at the time of the claim on which the exemption could operate under act of April 9, 1849, § 1. Purdon's Digest, 742.

The exemption applies only to property "owned by or in possession of any debtor." The allowance of the claim in this case does not and cannot benefit the debtor or his family, and for such and such only was it intended. Bowyer's Appeal, 21 Pa. 210.

Having, by his check, transferred his right to the money, the defendant had no title to the fund and could not claim the exemption. The defendant, in an execution, has no right to claim the exemption out of property to which he disclaims title. Gilleland v. Rhoads, 34 Pa. 187; Larkin v. McAnnally, 5 Phila. 17; Carl v. Smith, 8 Phila. 569.

The exemption applies only to property or money actually owed by the defendant. Huey's Appeal, 29 Pa. 219; Dieffender v. Fisher, 3 Grant Cas. 30; Emerson v. Smith, 51 Pa. 90, 88 Am. Dec. 566.

Freeman & Trunkey, for defendant in error.—Inasmuch as the original judgment was for more than $100 the justice had no jurisdiction to issue the attachment execution in this case.

By the act of April 15, 1845 (1 Purdon's Digest, 999, pl. 125 *et seq.*), the jurisdiction of justices of the peace was extended to the issuing, service, trial, judgment, and execution of all process required by the several sections of the act of June 16, 1836, relating to attachment executions; and this "extended" jurisdiction was intended to, and could, only take effect and operate upon judgments theretofore recovered, or which might thereafter be recovered under the law as it then existed, which limited the jurisdiction of justices to causes of action arising from contract, when the sum demanded was not above $100. Act of March 20, 1810 (1 Purdon's Digest, 977, pl. 32).

The act of February 18, 1869 (P. L. 208), provides "that the justices of the peace of the county of Erie shall have jurisdiction of all causes of action arising from contract, either express or implied, in all cases where the sum demanded is not above $300, as fully, to all intents and purposes, as they now have jurisdiction in cases" (arising from contract) "when the sum demanded does not exceed the sum of $100; and in case any suit or action

shall be commenced in the court of common pleas of Erie county upon any such contract, and the plaintiff shall obtain a judgment for a less sum than $300, he or they shall not be allowed to recover any costs," etc.; which act was extended to Warren county by the act of February 29, 1872 (P. L. 190).

This act simply enlarged the jurisdiction of justices of the peace, in respect to actions arising from contract and not otherwise; and not their jurisdiction under the act of 1845. Statutory remedies are to be followed with strictness, both as to the method to be pursued, and the cases to which they are applied. Lease v. Vance, 28 Iowa, 509; Bailey v. Bryan, 48 N. C. (3 Jones L.) 357, 67 Am. Dec. 246; Banks v. Darden, 18 Ga. 318; East Union Twp. v. Ryan, 86 Pa. 459.

Jacoby v. Shafer, 105 Pa. 610; Ormsby v. Grinolds, 42 Phila. Leg. Int. 415; Ross v. Miller, 14 W. N. C. 253, 1 Lanc. L. Rev. 137; Pagett v. Truby, 1 Pa. Co. Ct. 596; and Kraus v. Bickhart, 1 Chester Co. Rep. 479, have no bearing whatever upon the question under consideration; for in no sense of the word is an attachment execution an action arising from contract, but upon a judgment.

An attachment execution is nearest of kin to a foreign attachment, and the rules governing the latter writ must also govern the former. It is a more comprehensive writ than the writ of scire facias, which, at common law, was regarded as a new and independent action, referring to the former proceedings but wholly distinct from them. Greenway v. Dare, 6 N. J. L. 305; Green v. Leymer, 3 Watts. 381, 384; Stewart v. Peterson, 63 Pa. 230, 232; Co. Litt. Hargrave & Butler's notes, 290 b, 291 a, § 505; Pulteney v. Townson, 2 W. Bl. 1227; Grey v. Jones, 2 Wils. 251; Fenner v. Evans, 1 T. R. 268; Winter v. Kretchman, 2 T. R. 45, 46; Lowe v. Robins, 1 Brod. & B. 381; Baldwin's Appeal, 86 Pa. 483, 486.

An execution attachment is in affect a suit by the defendant against the garnishee, in the name of the plaintiff. Reed v. Penrose, 2 Grant Cas. 472, 488, 499; Drake, Attachm. 523.

The writ of scire facias, referred to in § 51 of the attachment act (attachment execution) must necessarily be regarded, as it often is under the common-law practice, in the nature of a summons, and as the commencement of an action. Smyth v. Ripley, 33 Conn. 306, 311; White v. Washington School Dist.

45 Conn. 59; Skidmore v. Bradford, 4 Pa. 296, 300; Delaware, L. & W. R. Co. v. Ditton, 36 N. J. L. 361.

The writ is required to be served upon both defendant and garnishee "in the manner provided for the service of a writ of summons in a personal action" (1 Purdon's Digest, 746, pl. 38) and commands them to appear on a certain day in court and show cause, etc. 1 Purdon's Digest, 745, pl. 37.

To this summons the defendant may appear and become a party, and plead payment or any other plea which he might have taken advantage of, upon a scire facias post annum et diem. Ogilsby v. Lee, 7 Watts & S. 444; Carter v. Wallace, 1 W. N. C. 63, 74; 1 Troubat & H. Pr. 696, § 1199.

The garnishee may plead anything against the plaintiff in the scire facias that he could plead against his own original creditor. Farmers' & M. Bank v. Little, 8 Watts & S. 207, 219, 13 Am. Dec. 293; 1 Troubat & H. Pr. 699, § 1202.

Both defendant and garnishee may have a jury trial, with its incidents —verdict and judgment—requiring original execution process for its enforcement. 1 Purdon's Digest, 746, pl. 41, cl. 2 and 827, pl. 25, 26; Baldwin's Appeal, 86 Pa. 483, 486.

In Ellsworth v. Barstow, 7 Watts, 314, in construing the act of 1810, it was held that a justice of the peace had not jurisdiction of an action arising on a judgment of a justice of the peace of another state. And it required, to give them jurisdiction over actions brought on the judgments of justices of other states, the act of February 27, 1845. 1 Purdon's Digest, 980, pl. 40; Kline v. McKee, 46 Pa. 519.

The causes of action arising from contract, either express or implied, which appertain to the jurisdiction of a justice of the peace, are those which arise from an agreement or understanding immediately between the parties. Schaffer v. M'Namee, 13 Serg. & R. 44; Zell v. Arnold, 2 Penr. & W. 292, 295; Kline v. McKee, 46 Pa. 519; Koons v. Headley, 49 Pa. 168, 172; Com. use of Potter v. Reynolds, 17 Serg. & R. 367.

If an attachment execution is an action, it is an action upon a judgment, and it cannot be contended that the act of February 18, 1869, enlarging the jurisdiction of justices of the peace in Erie county in respect to actions "arising from contract," affects or enlarges the jurisdiction conferred by the act of April 15, 1845.

The plaintiff, having failed to appear before the justice on the return day of the writ, should have been nonsuited. 1 Purdon's Digest, 984, pl. 55; Lawyer v. Walls, 17 Pa. 75; Vought v. Sober, 73 Pa. 49; Selfridge v. Tilghman, 1 Phila. 580.

The justice not having disposed of the cause on the return day of the writ, either by entering judgment or continuing the case to a time certain, lost his grasp of the same, and the proceedings thereafter before him were *coram non judice,* and void.

The writ of attachment is required to be served upon the defendant, or a judgment against the garnishee is void. Freeland v. Elsworth, 3 Luzerne Legal Reg. 45; Corbyn v. Bollman, 4 Watts & S. 342.

It is just as imperative that he should have notice of any adjourned or other hearing, and particularly of the time when the merits of the case are to be heard and disposed of by the justice. Brown v. Hambright, 2 Legal Chronicle, 38; Franke v. Dodge, 14 Lanc. Bar, 177; O'Malley v. Kerr, 4 Kulp, 86; Martin v. Wiggins, 1 Lanc. L. Rev. 141.

A judgment by default on a day subsequent to the return day of the summons, the record of the justice showing no adjournment, is void. McGreever v. Smith, 11 Luzerne Legal Reg. 76; Martin v. Wiggins, 1 Lanc. L. Rev. 141; Henderson v. Alexander, 1 Lanc. L. Rev. 11.

A justice of the peace, after hearing, may continue a case for consideration to some day and hour certain, but the record must show the adjournment or continuance. Van Horn v. Independent Order of C. T. No. 76, 10 Luzerne Legal Reg. 158, 13 Lanc. Bar. 60; and see also, Woodworth v. Wolverton, 24 N. J. L. 419; Dittmar Powder Mfg. Co., State Prosecutors, v. Leon, 42 N. J. L. 540; Blanchard v. Walker, 4 Cush. 455; Murdy v. McCutcheon, 95 Pa. 435, 436.

It is the right and duty of the garnishee to insist upon and take advantage of the irregularities presented by the record in this case. Skidmore v. Bradford, 4 Pa. 296, 301; Swanger v. Snyder, 50 Pa. 218, 223; Kelso v. Kelly, 14 Pa. 204; Bank of Northern Liberties v. Munford, 3 Grant Cas. 232; Baldy v. Brady, 15 Pa. 103, 108.

The defendant Pryor's claim to the $300 exemption was properly made and in time. Yost v. Heffner, 69 Pa. 68; Landis v. Lyon, 71 Pa. 473; Bittenger's Appeal, 76 Pa. 105; Morris

v. Shafer, 93 Pa. 489; Howard Bldg. & L. Asso. v. Philadelphia & R. R. Co. 102 Pa. 220.

The only question we have to consider is whether the check drawn by Pryor, to the order of McMurtrie, for $200 on October 23, 1886, five days before the attachment was served on the garnishee, but which was not paid until one day after such service, operated to defeat his claim to the exemption, to the amount of said check.

It is the duty of the garnishee to insist upon the defendant's rights in the premises. In Jones v. Tracy, 75 Pa. 417, after the defendant claimed his exemption, the garnishee suffered judgment by default for want of an appearance; and it was held that the defendant could not be affected by the garnishee's failure to appear, and that the judgment against the latter ought to have been so framed as to protect the defendant's exemption.

The check given by the defendant, Pryor, to McMurtrie on October 23, 1886, operated as an equitable assignment *pro tanto* of the fund upon which it was drawn, in the hands of the garnishee, both as against said Pryor and the attachment process.

As between the drawer and payee (or holder) the delivery of the check constitutes an assignment of the amount. 2 Dan. Neg. Inst. 3d ed. §§ 1638, 1643; Byles Bills, 6th Am. ed. 36, *20; Morrison v. Bailey, 5 Ohio St. 13. 17, 64 Am. Dec. 632; *Re* Brown, 2 Story, 516, Fed. Cas. No. 1,985; Keene v. Beard, 8 C. B. N. S. 372; Union Nat. Bank v. Oceana County Bank, 80 Ill. 212, 22 Am. Rep. 185; National Bank v. Indiana Bkg. Co. 114 Ill. 483, 2 N. E. 401; Roberts v. Corbin, 26 Iowa, 327, 96 Am. Dec. 146; Deener v. Brown, 1 MacArth. 350; Harker v. Anderson, 21 Wend. 372, 381; Morse, Banks & Banking, 468.

An attaching creditor stands simply in the shoes of his debtor; and any equities that could be set up against the latter are equally available against the former. Patten v. Wilson, 34 Pa. 299, 300; Noble v. Thompson Oil Co. 79 Pa. 354, 21 Am. Rep. 66; Stevens v. Stevens, 1 Ashm. (Pa.) 190; United States v. Vaughan, 3 Binn. 394, 5 Am. Dec. 375; Com. v. Watmough, 6 Whart. 117; Nesmith v. Drum, 8 Watts & S. 9, 42 Am. Dec. 260; Riddle v. Etting, 32 Pa. 412; Myers v. Baltzell, 37 Pa. 491; Farmers & M. Nat. Bank v. King, 57 Pa. 202, 98 Am. Dec. 215; Reed v. Penrose, 2 Grant Cas. 472, 488, 499; 2 Dan. Neg. Inst. 3d ed. § 1644.

A check given bona fide for a valuable consideration operates as an equitable assignment *pro tanto,* of the funds upon which it is drawn, both as against the drawer thereof and an attachment creditor, although not presented for payment until after service of process on the garnishee. 2 Dan. Neg. Inst. 3d ed. § 1644; National Bank v. Indiana Bkg. Co. 114 Ill. 483, 2 N. E. 401; Schuler v. Laclede Bank, 27 Fed. 424; German Savings Inst. v. Adae, 1 McCrary, 501, 8 Fed. 106; First Nat. Bank v. Coates, 3 McCrary, 9, 8 Fed. 540; Roberts v. Corbin, 26 Iowa, 327, 96 Am. Dec. 146; Voorhes v. Hesket, 1 Ohio C. C. 1. See *Ex parte* Alderson, 1 Madd. 53; Corser v. Craig, 1 Wash. C. C. 424, Fed. Cas. No. 3,255; Sharpless v. Welsh, 4 Dall. 279, 1 L. ed. 833, and Hyatt v. Prentzell, 20 Phila. Leg. Int. 133.

The authorities cited and relied upon by the plaintiffs, as holding a contrary doctrine, are clearly distinguishable from the case at bar.

The distinction between a bill of exchange or draft, and a check in this respect, has been repeatedly recognized and pointed out by the courts. Morrison v. Bailey, 5 Ohio St. 13, 64 Am. Dec. 632; Stewart v. Smith, 17 Ohio St. 82; Champion v. Gordon, 70 Pa. 474, 10 Am. Rep. 681; Lawson v. Richards, 6 Phila. 179; Merchants Nat. Bank v. State Nat. Bank, 10 Wall. 604-607, 19 L. ed. 1008.

A failure on the part of the courts to always observe the distinction between the two classes of instruments has no doubt occasioned the seeming conflict of the authorities upon the question under consideration.

Opinion by Mr. Justice Sterrett:

An examination of the record satisfies us that the judgment entered on the case stated is correct; and for reasons given in the opinion of the learned judge of the common pleas, it should be affirmed.

Judgment affirmed.

Richard Ashman et al., Exrs. of Mary Jane Ashman, Deceased, et al., Plffs. in Err., *v.* R. B. Wigton et al.

R. B. Wigton et al., Plffs. in Err., *v.* Richard Ashman et al., Exrs. of Mary Jane Ashman, Deceased, et al.

Where the surface is owned by one person and the underlying coal by another the surface owner's possession of the surface gives him no right whatever in the coal; and hence his intrusion renders him a trespasser.

The owner of the surface is therefore liable in an action of trespass *q. c. f.*, to the owner of the coal, for mining and removing it without license.

A grant of all the coal on the northwest side of a gangway to be run from a point, within a tract, "northeast to cross the tract aforesaid at water level which route is to be ascertained by a survey after the gangway has been commenced" conveys only the coal included in and north of the angle formed at the point of beginning, by the gangway as laid out and a line drawn from that point northwestwardly at right angles to the general direction of the gangway.

(Argued May 5, 1887. Decided October 3, 1887.)

January Term, 1887, Nos. 289, 360, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error (two writs) to the Common Pleas of Clearfield County to review a judgment on a verdict for the plaintiffs in an action of trespass *quare clausum fregit*. As to the first writ, reversed; as to the second, affirmed.

The facts as they appeared at the trial before WILLIAMS, P. J., were as follows:

In 1867 Mrs. Ashman was the owner in possession of a certain tract of coal mining land, and Messrs. Wigton and Dorris were interested in other coal land in the same vicinity; and in order to develop them desired to run a railroad through Mrs. Ashman's land; and she, in consideration of the supposed advantage to

Cited in Finnegan v. Stineman, 5 Pa. Super. Ct. 124, 131, 28 Pittsb. L. J. N. S. 61, 41 W. N. C. 19.

NOTE.—See note to Phoenix Iron Co. v. Lewis, 2 Sad. Rep. 7.

her, entered into an agreement, the material portion of which is set forth in the opinion of the court.

A gangway also provided for under that portion of said agreement was built according to the terms of the contract running northeast and southwest where coal was mined for several years by Wigton and Dorris.

By subsequent agreement Mrs. Ashman conveyed an undivided half of this property to one Pardee, one of the plaintiffs, subject to the agreement with Wigton and Dorris. Mrs. Ashman died and the plaintiffs, her executors, and said Pardee brought this suit claiming to recover for coal alleged to have been taken by Wigton and Dorris outside of the limits of their contract.

Under the rulings of the court plaintiffs recovered for some coal taken out by Wigton and Dorris on the southeast of the gangway. But the evidence showed a large amount of coal to have been taken by Wigton and Dorris from the southwest corner of the Ashman tract and west of Weiss Run. According to plaintiffs' construction of the article this was not within the limit of defendants' coal right. As the ruling of the court prevented plaintiffs' recovery for this coal they have taken their writ of error. The defendants by their writ of error sought to review the ruling which permitted any recovery whatever.

McEnally & McCurdy and *W. H. Woods,* for plaintiffs below. —Wigton and Dorris had under the agreement no right to mine coal, except such as lay northwest of the gangway as actually made, and between parallel lines drawn northwestwardly from the two ends of the gangway.

Orvis & Snyder and *Murray & Gordon,* for defendants below. —Wigton and Dorris were entitled to mine not merely the coal lying northwest of the gangway as actually made, but all coal in the tract lying northwest of the line of the gangway prolonged through the tract.

Where the starting point is fixed, and the course of the line running from it is designated, these determine the boundary. The maxim, *Id certum est quod certum reddi potest,* applies. Hagey v. Detweiler, 35 Pa. 409, 413; Flagg v. Thurston, 12 Pick. 145.

The boundary is explicit and unambiguous, on the face of the contract, and there is no difficulty in ascertaining its starting

point and course. Therefore it is simply a question of the construction of the contract; and outside proof, if offered, would not have been admissible to show its application to another line or limit.

In applying descriptions to local objects, it must be understood that the parties had reference to local objects as they existed at the time the deed was made, unless there is something to control this presumption. Stearns v. Rice, 14 Pick. 411, 413.

It is the intention of the parties as expressed, and not an intent to be proved by evidence *aliunde*, and not expressed, which must govern. Cook v. Babcock, 7 Cush. 528; Beeson v. Hutchison, 4 Watts, 442; Simpson v. Murray, 2 Pa. St. 76.

If a deed in express terms fix one of the boundaries at a certain distance from an established line, evidence of measurements from other points not referred to in the deed, for the purpose of fixing that boundary, is inadmissible unless it be shown that the position of the established line referred to cannot now be ascertained. Liverpool Wharf v. Prescott, 4 Allen, 22.

Plaintiffs in error having title to the line designated by the contract, the mode or manner of taking out the coal cannot affect their title. They could open any number of gangways, but their title to that boundary would remain.

Every presumption is against a construction of the grant which abridges or narrows its limits, for the reason that such construction operates as a forfeiture *pro tanto*. Newman v. Rutter, 8 Watts, 51; McKnight v. Kreutz, 51 Pa. 232; Helme v. Philadelphia L. Ins. Co. 61 Pa. 107, 100 Am. Dec. 621.

The plaintiffs in error having entered into possession of the Christian Wirtz, Jr., tract, under the contract of April 27, 1869, and having so continued in possession until the bringing of the suit, were not liable in trespass even if they did exceed their limits.

Under the grant they were in possession of both the surface and the mineral estate, with buildings and improvements. Their possession was not by operation or authority of law but by express contract with the defendants in error. In such case the rule is applicable that for an excess over what is covered by the grant, trespass does not lie.

To enable a person to bring an action of trespass *quare clausum fregit* he must have actual possession of the land. 2 Rapalje & L. Law Dict. 1292; Weitzel v. Marr, 46 Pa. 463.

Trespass will lie against one who enters on land by authority of law for exceeding his authority after entry; but it will not lie against one who has entered under a contract with the owner, for an injury done to the premises, before the term of consent has been determined. Boults v. Mitchell, 15 Pa. 371.

One exceeding his authority after an entry under authority of law is a trespasser, *aliter* for abuse of authority after entry under contract. Narehood v. Wilhelm, 69 Pa. 64; Berkey v. Auman, 91 Pa. 481.

McEnally & McCurdy and *W. H. Woods,* in reply.—The cases quoted by the other side distinctly admit and declare that where a person or party has any exclusive right in real estate he can, in vindication of his rights, legally maintain an action of trespass *quare clausum fregit* against anyone, even against a party who may have other interests in the soil.

Whenever there is an exclusive right, trespass may be supported, although the party has not the absolute right to the soil or the whole property therein; as if a person have an exclusive right to cut turf and peat, or cut thorns, he may support trespass *quare clausum fregit,* and for cutting the turf. 1 Chitty, Pl. p. 163; Forsythe v. Price, 8 Watts, 282, 34 Am. Dec. 465; Kissecker v. Monn, 36 Pa. 313, 78 Am. Dec. 379.

Opinion by Mr. Chief Justice Gordon:

The principal controversy in this case, the only one that we need specially notice, is that arising on the answer of the court below to the fourth point of the plaintiffs below, which point and answer are as follows:

"The defendants had no right to the coal in those portions of the land belonging to Mrs. Ashman, or to Ashman and Pardee, which were south or east of said gangway." *Answer,* "If by these words 'south or east of said gangway' is meant the southeast side of the gangway, we affirm this point. The contract provided for the division of the warrant for mining purposes upon the line of the gangway from the present coal shaft near the division line between Christian Wirtz, Jr. and William Wirtz. The coal on the northwest of this line belonging to defendants, and to be paid for by a conveyance of an equal amount of coal land from the Philip Stone, on the northeast side of the line, to the Ashmans, this is a fair and reasonable arrangement

adopted to advance the interests and suit the convenience of both parties to the contract."

It will be observed that in the construction of the agreement of the 27th of April, 1869, the court adopted, not the gangway itself, but the line of the gangway, or drift extended to the southern boundary of the tract, as the true division of the coal between the contestant parties. In this we are constrained to dissent from the conclusion thus adopted by the learned judge. The contract referred to reads in this manner: "Also the right to run a gangway, commencing at a point on Weiss Spring Run, near where the present coal shaft is sunk, and near the division line between the Christian Wirtz and William Wirtz, thence running northeast to cross the tract aforesaid at water level, which route is to be ascertained by a survey after the gangway has been commenced. And the said Wigton and Dorris, their heirs, and assigns are to have and possess all the coal on the northwest side of said gangway, and the said Ashman and wife, their heirs, and assigns, to have and possess all the coal on the northeast (southeast) side of said gangway."

From the above it will be observed that what the parties had mainly in view, was not a line but a drift or gangway, to begin near a certain coal shaft, and to run across the Christian Wirtz tract. The direction mentioned was evidently not specific but approximate only, for the line was to cross the tract at water level, and to be ascertained after the gangway had been commenced; so, as the water level could not be ascertained until after the gangway was commenced, necessarily its direction could not be known until after that event.

Moreover, a strict water level could not be followed; otherwise the drift could not be drained, an element essential to its use. It follows that direction, to a certain extent, must depend upon the judgment of those employed by Wigton and Dorris to dig the gangway. But Wigton and Dorris were the parties to determine this matter; and when they had determined it, and had constructed the gangway, they also had determined and absolutely fixed the line between themselves, and Mrs. Ashman; for they, Wigton and Dorris, "are to have and possess all the coal on the northwest side of said gangway, and said Ashman and wife to have and possess all the coal on the northeast side of said gangway."

Nothing can be plainer than this: but one gangway was con-

templated, and not, as the defendants contend, two or more until they reached the water level; and when that was constructed, the rights of the parties, in respect to the coal, were definitely fixed and settled. But if we are limited to the gangway, we are not permitted to extend the line of it south of its commencement for we would thus abandon the true line fixed in the ground, and in that event we might as well adopt the logic of the defense throughout. This, however, the court below properly refused to do, but seems to have overlooked the fact that if the gangway was to be adopted as the true partition line, it must needs be adopted throughout; must start where it begins and stop where it ends; we must have regard, not only to the line but to its corners.

It follows that the defendants had no right to the coal south of the south end of the gangway, and of a line drawn at right angles to its general direction, and extending to the western line of the tract.

As to the contention of the defendants, on their writ of error, that as they were in possession of the premises the action of trespass cannot be sustained, we have but to say: The only lawful possession they had of the land east and south of the gangway was of the surface; but as the coal and surface were distinct estates their possession of the latter gave them no right whatever in the former; hence, their intrusion into the plaintiffs' coal rendered them trespassers.

The judgment in the first stated writ of error, Richard Ashman *et al.* v. R. B. Wigton *et al.*, is reversed, and a new *venire* ordered.

The judgment as to the second writ is affirmed.

Henry M. Stryker et al., Plffs. in Err., *v.* John Ross.

It is error, in the trial of a case, to permit evidence to go to a jury that shows that an award had been previously made by arbitrators in the same matter in favor of one of the parties; the tendency of such evidence being to give to the former successful party the benefit of whatever impression might be made on the minds of the jurors by the fact that the cause had once been determined in his favor by judges of the parties' own choosing, which may have been a substantial injury.

(Argued May 27, 1887. Decided October 3, 1887.)

January Term, 1887, No. 399, E. D., before GORDON,

TRUNKEY, STERRETT, GREEN, and CLARK, JJ. ERROR to the Common Pleas of Huntingdon County to review a judgment on a verdict for the plaintiff in an action of trespass *quare clausum fregit*. Reversed.

This is an action of trespass *quare clausum fregit*, brought by John Ross against W. W. Stryker and others to recover damages for an alleged breach of the plaintiff's close; in other words, it is an action of trespass to recover damages which the plaintiff alleges he has sustained by reason of the defendants' entering upon his premises and tearing down or destroying a certain shed and taking away certain coal therein, the property of the plaintiff.

The dispute in this case is as to the true division line or boundary between the lot of the plaintiff and that of W. W. Stryker, under whom these defendants claim.

The defendants below offered to show: First, that at the public sale at which John Ross bid off his piece of ground that the agent and lessee of Mrs. Walker gave notice that she claimed all the ground in lot No. 117, from Shaver's creek to the eastern line of the sheds; second, by George B. Orlady, that when he owned the lot he claimed only to run 73 feet west from King street and that Mrs. Walker, the adjoining western owner, claimed by the same line; third, by same witness, that when he owned the property he fenced up that line or so much thereof as was not inclosed by the sheds, and that Mrs. Walker, the adjoining western owner, and he, recognized that as their division line, and that the fence so stood at the time of the assignee's sale to John Ross; fourth, by the same witness, and one of the assignees of Henry Orlady, and who delivered the deed, that at the time of the delivery of the deed that he informed Ross that he only proposed to sell to him 73 feet from King street down to the sheds, that Mrs. Walker claimed and was in possession by her tenants of the western part of the lot and the sheds, and that if he was not willing to take the deed with that understanding, that he would put it up again for sale, and that a map (see Exhibit B) was exhibited, showing the amount of ground he was willing to convey, and would convey, and that with this understanding, Ross accepted the deed; and further, that he stated the same thing to David Barrick, who bought the property for John Ross, at the time of the sale and previous to the confirmation.

These four several offers were excluded by the court and con-

stituted the first, second, third, and fourth specifications of error.

Under objections from the defendants, the court permitted the witness on the stand to state that Ross, who entered a rule to arbitrate this case, had been successful before the arbitrators. This constituted the fifth specification of error.

The following points were submitted by the defendants:

1. That at the time of the alleged trespass complained of, the defendants were in exclusive possession of the *locus in quo*. And the plaintiff cannot recover.

Ans. Refused because this raises a question of fact for the jury.

2. That there is no evidence that the plaintiff was ever in possession of the *locus in quo*, or that he had any possession at the time of the alleged trespass, and that the verdict must be for the defendant.

Ans. Refused.

3. That the tortious entry on the *locus in quo* on Saturday, to put in posts for the erection of sheds, which he put in after notice from the clerk and agent of the defendants that they would be cut down and removed, and which were cut down and removed on the following Monday by the defendants, does not in law constitute a trespass on the part of the defendants, as they were in possession of the property, and if the plaintiff claimed the property, his remedy was by ejectment.

Ans. This point is predicated upon only a part of the testimony. It also assumes facts in dispute, and is therefore refused.

4. That the uncontradicted evidence, not saved even by the exploded scintilla, is that at the time of the alleged trespass, the defendants were in the exclusive possession of the *locus in quo* and that the verdict must be for the defendants.

Ans. This is refused, it being a question of fact, with other facts, which we have submitted to the jury.

5. That the calls in a deed are always to be controlled by fences, or other marks on the ground, and that if the jury believe that there was a fence or other marks on that ground at 73 feet west of King street, forming the western boundary of the ground purchased by John Ross, the plaintiff at the time of his purchase, and he being a resident of Petersburg, knew that

such a fence formed the eastern boundary, that this title to the ground purchased by him would be confined to the said fence as the western boundary of his lot.

Ans. It is for the jury to determine, under all the facts in this case, where the true division line is between the lot of plaintiff and defendants.

If from the evidence the jury is satisfied that the alley fence was the true line of division, then the plaintiff had no authority to build his sheds west of that line, and he could not recover. We cannot affirm this point as stated therein—as it assumes disputed facts for the jury to determine.

6. That by the draft produced in evidence by George B. Orlady, supplemented by his evidence, he did at the time of the execution and delivery of the deed by him as assignee to John Ross, the plaintiff, sell and convey the ground to him, as represented on the draft by a line 73 feet from King street, then the plaintiff had no title to the ground where the sheds and posts were put up, the place where the alleged trespass was committed. And that the plaintiff so took the deed, and with that understanding there is no contradiction or denial, not even from the plaintiff, who was present during the whole trial.

Ans. This point assumes facts which are disputed and therefore cannot be affirmed; and for further answer we refer to our general charge as to the line or boundary between plaintiff and defendant.

7. That upon all the evidence in the case the verdict should be for the defendants.

Ans. Refused.

To the answer to these points and the charge, the defendants excepted.

Verdict for the plaintiff and judgment thereon.

The remaining assignments of error specified the ruling of the court on the points of evidence, and the answers to the points.

R. B. Petrikin and *M. M. McNeil*, for plaintiffs in error.—The offers contained in the second and third specifications should have been admitted. Adjoining owners can establish by consent on the ground, and the declarations or acts of either of the parties if dead would be evidence, for or against a purchaser from either of them. Ross is the vendee of Orlady's title, and

the defendants in this case are the vendees of Mrs. Walker's title. What, therefore, could be more pertinent than the testimony, not of the dead owner, but of the living? Kerr v. Wright, 37 Pa. 196; Hagey v. Detweiler, 35 Pa. 409; Mills v. Buchanan, 14 Pa. 62; Alden v. Grove, 18 Pa. 377; Rice v. Bixler, 1 Watts & S. 453; Kellum v. Smith, 65 Pa. 86.

The reason given by the judge for rejecting the offer is without foundation. He excludes the evidence because in his "opinion it is intended for the purpose of contradicting the deed made." It was not offered for any such purpose. That the evidence should have been admitted is settled by the case of Craft v. Yeaney, 66 Pa. 211.

The evidence offered by the witness and excluded by the court under this specification was competent for the purpose for which it was offered: (1) To explain any ambiguity in the description; (2) to show that the plaintiff fully understood at the time of his purchase that he was only buying by a line 73 feet west of King street; (3) to reform the deed, if there was a misdescription, contrary to the intent of the parties. Tate v. Reynolds, 8 Watts & S. 91; Mageehan v. Adams, 2 Binn. 109.

A levy obscure in its terms, as to the property embraced, may be explained by parol, and it is then a fact for the jury. Scott v. Sheakly, 3 Watts, 50; Titusville Novelty Iron Works' Appeal, 77 Pa. 103; Hoffman v. Danner, 14 Pa. 25.

It is error to permit the introduction of testimony showing the result of a former trial. Shaeffer v. Kreitzer, 6 Binn. 430.

In Humphreys v. Kelly, 4 Rawle, 305, under exception by defendant's counsel, the court below permitted the plaintiff to read that part of the docket entries which showed that the defendant below had appealed from the award of arbitrators, and for this reason the judgment was reversed.

In Hyslop v. Crozier, 1 Miles (Pa.) 267, a new trial was granted, because during the trial one of the counsel for the plaintiff stated that the arbitrators from whose award the appeal had been taken had found for the plaintiff.

The rule that to maintain an action of trespass such as is here instituted the plaintiff must be either in the actual or lawful possession of the premises in dispute, or he must have the immediate right to the possession flowing from the right of property—is a correct rule of law in an action of trespass as to personal

property, but not the rule as to real property. Lewis v. Carsaw, 15 Pa. 34.

There is a material distinction between personal and real property, as to the rights of the owner; in the first case we have seen that the personal property draws to it the possession sufficient to enable the owner to support trespass, though he has never been in possession; but in the case of land, or other real property, there is no such constructive possession; and unless the plaintiff had the actual possession by himself or servant, at the time when the injury was committed, he cannot support this action. 1 Chitty, Pl. 176, 177; Mather v. Trinity Church, 3 Serg. & R. 512-518, 8 Am. Dec. 663; Caldwell v. Walters, 22 Pa. 380; Clark v. Smith, 25 Pa. 139; Zell v. Ream, 31 Pa. 304; Carroll v. Carroll, 2 Chester Co. Rep. 119; Shoenberger v. Baker, 22 Pa. 403, 404.

Calls in a deed are always to be controlled by marks on the ground. Craft v. Yeaney, 66 Pa. 210.

Brown, Bailey, & Brown, for defendant in error.—The numerous authorities cited in plaintiff's paper book are all upon cases where adjoining owners had established a consensual division line. They have no application to the facts of the case on hand.

Wingard had a right to establish this alley or road across his own property for his convenience. His right to do so proceeds from the "highest right of property, to wit, the dominion over the land itself." It was opened as a permanent way in 1852, and has continued open ever since and used by the several owners of the several purparts of the lot.

Such a way continues unaffected by liens or sales public or private. Pennsylvania R. Co. v. Jones, 50 Pa. 417.

There was no dispute that the *locus in quo* was not in the actual occupancy of anyone until Ross built the new shed, and then he was in the actual occupancy and so continued until the trespass complained of was committed. Before that it was neither inclosed nor cultivated. It was a small piece of ground lying south of the old shed within the lines of Ross's purchase and abutted on the roads or alleys on the western and southern sides.

The constructive possession where there is no actual possession is in him who has the legal and rightful title. Norris's Appeal, 64 Pa. 275.

There was no possession whatever by the defendants, of the *locus in quo*. None was shown on the trial—certainly not such possession permanently continued as would take away from the owner that possession which the law attaches to the legal title. Young v. Herdic, 55 Pa. 172; Hole v. Rittenhouse, 25 Pa. 493; Adams v. Robinson, 6 Pa. 271; Beaupland v. McKean, 28 Pa. 134, 70 Am. Dec. 115; Washabaugh v. Entriken, 34 Pa. 74.

The jury found the legal title to be in Ross, and his ownership of the *locus in quo* drew to him such possession as would enable him to maintain trespass. Hughes v. Stevens, 36 Pa. 320.

But he had actual possession or he could not have erected the shed and deposited coal in it.

In Johnston v. Irwin, 3 Serg. & R. 291, it is ruled that although residence is not a necessary ingredient of adverse possession, there must be inclosure and cultivation.

The occupancy of a trespasser who neither incloses nor cultivates continues no longer than he remains in contact with the soil. Wright v. Guier, 9 Watts, 172, 36 Am. Dec. 108.

Opinion by Mr. Justice Sterrett:

If it were not for the ruling complained of in the fifth specification of error, this judgment should be affirmed.

Counsel for plaintiff below, on cross-examination of defendants' witness, put a question calculated to elicit the fact that the arbitrators in this case awarded in favor of his client. This was objected to, but the witness answered, saying: "At the time of this conversation Ross had won this suit before the arbitrators." The learned judge then refused the request of defendants' counsel to strike out the question and answer as improper and irrelevant; and thereupon exception was taken.

This may appear to be a trivial matter on which to reverse an otherwise sustainable judgment; but if we adhere to the ruling in Shaeffer v. Kreitzer, 6 Binn. 430, and Humphreys v. Kelly, 4 Rawle, 305, we must hold it was error. In the latter case the court below under exception permitted plaintiff to read part of the docket entries which showed that the defendant below had appealed from the award of arbitrators. In the opinion, reversing the judgment, this court said: "It is, beside, impossible not to see that the drift of the evidence was to give the plaintiff the benefit of whatever impression might be made on the minds of

the jurors by the fact that the cause had once been determined in his favor by judges of the parties' own choosing. This may have been a substantial injury and defendant ought not to have been exposed to the danger of it."

This reasoning is equally applicable to the present case; and for the error (into which the court was doubtless inadvertently led) the judgment must be reversed.

It is unnecessary to specially notice the remaining specifications, further than to say that there is no error in either of them that would warrant a reversal of the judgment. The case depended mainly on questions of fact which were exclusively for the jury.

Judgment reversed and a *venire facias de novo* awarded.

Belle Wilcox, For Use, etc., Plff. in Err., *v.* Nason Rowley et al.

Where a party about to take an assignment of a judgment note applies to the maker and is informed by him that the note is good and subsequently purchases the same on the faith of such representation, the maker is estopped, as against such party or his assignee, from setting up a failure of the original consideration of the note.

(Argued May 26, 1887. Decided October 3, 1887.)

July Term, 1887, No. 61, E. D., before GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Court of Common Pleas of Warren County to review a judgment for defendants upon an issue formed upon the opening of a judgment and plea of payment. Reversed.

The assignments of error were based upon the admissions of certain offers of evidence by the plaintiff, upon the answers to the points as stated below, and the action of the court in directing a verdict for defendants.

On the trial, plaintiff proposed to prove by Daniel Rhodes that prior to Clark's purchase of the judgment in question from the witness, that he told Clark that Nason Rowley, one of the defendants, had told him, the witness, that the judgment was all

NOTE.—The same determination under similar circumstances is found in Humphrey v. Tozier, 154 Pa. 410, 26 Atl. 542.

right and was good; to be followed by evidence that it was on the strength of that representation that Clark purchased the judgment and paid his money for it; for the purpose of showing an estoppel.

Objected to as incompetent for the purpose. Objection sustained and testimony rejected. (First assignment of error.)

Plaintiff further proposed to prove by Clark that, previous to his purchase of the judgment from Daniel Rhodes, Daniel Rhodes informed him that Nason Rowley, previous to Rhodes's purchase, informed him that the judgment was good, all right, and no incumbrances against it; and that he, Rhodes, purchased on the faith of that declaration and that the witness made the purchase, after the declaration to him by Rhodes, of what Rowley had said, for a valuable consideration and on the strength of that declaration; and that had it not been for the declaration communicated to him by Rhodes, he would not have purchased the judgment; for the purpose of establishing an estoppel, first, so far as Rhodes is concerned and then extending it down to and covering the purchase of Clark.

Objected to as incompetent. Objection sustained. (Second assignment of error.)

Plaintiff (under the evidence now given, that Mr. Rhodes informed Nason Rowley that if he purchased the judgment, he was going to let Mr. Clark have it) now renewed the proposition contained in the third offer of the plaintiff's testimony, to prove that Mr. Rhodes, prior to his sale of the judgment to Mr. Clark, informed Mr. Clark what Nason Rowley told him about the judgment before he purchased it; that Nason Rowley told him that the judgment was good, and that there was nothing against the judgment or against them, the defendants; and on the faith of that representation, the purchase was made by Mr. Clark, and the money paid.

Objected to as incompetent. Objection sustained, testimony rejected. (Third assignment of error.)

The plaintiff requested the court to charge:

1. That if, prior to the purchase of the judgment by Rhodes from Parker, Rhodes went to Nason Rowley to inquire about the judgment, and whether there was anything against it, and if there was not he would purchase it, and intended to sell it to Clark, and in answer to the inquiry Rowley informed him that

it was good, and there was nothing against it, and on the faith of that representation, Rhodes purchased, and paid a valuable consideration for it, Rowley is now estopped from showing that any encumbrance existed against the land, for which the judgment was given, or from showing any defense to the payment of the judgment.

Ans. Whether correct or not in the abstract, we say to you that there is no evidence that estops the defendant from setting up the failure of consideration of the judgment. (Fourth assignment of error.)

2. As the judgment note provided for the privilege of paying the whole or any part thereof before maturity it was the duty of defendants to pay the Harmon mortgage when required, and they can defend against the payment of the judgment only to the amount of the Harmon mortgage.

Ans. This point is answered in the negative. (Fifth assignment of error.)

The court, Brown, P. J., charged the jury as follows:

On the 16th of April, 1881, the defendants, E. D. and Nason Rowley, executed and delivered to the plaintiff, Belle Wilcox, a judgment note for $1,378.12, payable in seven years from date with interest annually, with the privilege of paying the whole or any part before the maturity of the note. Upon this note a judgment was entered in the court on the 25th of April, 1881. This judgment was assigned by the plaintiff to Charles Parker in May, 1881, and by Charles Parker to Daniel Rhodes in February, 1883, and by Daniel Rhodes to C. W. Clark, the present use plaintiff, on the 21st of February, 1883.

The defendants made application to open the judgment, alleging that the consideration of it had failed. In order that this question might be tried before a court and jury, the judgment was opened, and it is now before us for disposition. As against the judgment the defendants allege, and the undisputed evidence is, that this judgment of $1,378.12 was given as the consideration of some 39 or 40 acres of land, that was deeded by Belle Wilcox to the defendant, as of the date of the judgment note. The undisputed evidence is that this was the consideration of the judgment. The defendants then showed that in 1854 Hosea Harmon, who had become the purchaser of this land, executed a mortgage on the same to John F. McPherson, who

was trustee for the estate of Israel Cayle. The mortgage seemed to have laid quiet for many years. But upon the mortgage judgment was obtained, and execution was issued and the land that formed the consideration of this judgment was sold to D. I. Ball, and he took possession; and the defendants yielded up to the paramount title under the mortgage.

We say to you that standing thus, upon the undisputed evidence, the defendants have shown an entire failure of the consideration. The deed that they received was a warranty deed. By virtue of the encumbrance existing upon the property at the time of the making of the deed by Mrs. Wilcox to the defendants, the title was swept away, so that the defendants obtained nothing by the deed. The consideration of the judgment failed. This entitles the defendants to a verdict, unless there has been something in the conduct of the defendants that estops them or prevents them from asserting a defense. Upon the part of the plaintiffs, that is the equitable plaintiffs, it is alleged that so far at least as Mr. Rhodes is concerned, that he acquired a good title to the judgment, by reason of having become the purchaser of it upon the allegation of Nason Rowley that there was no defense to it.

We say that in order to constitute an estoppel it must appear by clear evidence, by evidence at least satisfactory to the jury, that the assignee Rhodes, or the assignee Clark, was misled, or led into the purchase of the judgment, and the expenditure of money, by the conduct of the defendants.

There are many cases that are exclusively for the determination of the jury. There are others that are exclusively for the determination of the court. We think this is a case where the responsibility of determining it aright rests with the court. And if we are in error, the supreme court will correct us. We then say to you that upon the undisputed evidence in the case, your verdict should be in favor of the defendants. We think there is no evidence in the case that in justice or equity estops the defendants from setting up the defense that they beyond all question had as against the legal plaintiff, Mrs. Wilcox.

Verdict and judgment for defendants.

Allen & Higgins, and *R. Brown*, for plaintiff in error.—The court erred in rejecting the testimony contained in the first three specifications. McMullen v. Wenner, 16 Serg. & R. 18.

16 Am. Dec. 543; Edgar v. Kline, 6 Pa. 327; Elliott v. Callan, 1 Penr. & W. 24; Chapman v. Chapman, 59 Pa. 214; Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492.

In Miller's Appeal, 84 Pa. 391, it is held that where one, by some positive act or declaration, influences or induces another to purchase, both parties acting in good faith, and a loss occurs it must be borne by him whose act or declaration occasioned it. The doctrine of estoppel by matter *in pais* has been greatly extended by the courts in modern times. The instruction of the court to the jury, that the evidence did not constitute an estoppel, is not in accordance with the above cited authorities, and the modern doctrine applied to acts which constitute an estoppel.

If the defendants were estopped as to Rhodes, they are estopped as to his assignees. Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492; Ashton's Appeal, 73 Pa. 153.

As to the fifth specification, if the Rowleys had the money in their hands to pay the Harmon mortgage, then their duty was to pay it, and they could be relieved to the extent of the payment and their necessary expenses, and no more. McGinnis v. Noble, 7 Watts & S. 454.

As the defense is purely equitable, it seems right and just that their defense be confined to the amount on the Harmon mortgage, and that there be a recovery against them for the balance of the judgment. This principle seems to be sustained by Tod v. Gallagher, 16 Serg. &. R. 261, 16 Am. Dec. 571, and Harper v. Jeffries, 5 Whart. 26.

Dinsmoor & Cable, for defendants in error.—The mortgage of H. Harmon to John F. McPherson, trustee, which swept away the land for which the judgment note was given, was of record. It described the land mortgaged with precision. Mortgages are within the provisions of the recording acts, and are as much notice to the world as deeds. And every person is as much bound to take notice of them. "The recording of a mortgage is constructive notice to the world." Evans v. Jones, 1 Yeates, 172.

Estoppel has for its indispensable ingredient fraud, either actual or implied from culpable negligence.

"But it is obvious there can be no such fraud where the purchaser or other actor was, or ought to have been, acquainted with the subject of his action, or even had the means of knowledge and

neglected to avail himself of them. Hepburn v. M'Dowell, 17 Serg. & R. 383, 17 Am. Dec. 677. . . . To the constitution of this species of estoppel [*in pais*] at least three ingredients seem to be necessary: First, misrepresentation or wilful silence by one having knowledge of the fact; second, that the actor, having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and thirdly, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively." Com. v. Moltz, 10 Pa. 527, 51 Am. Dec. 499; Crest v. Jack, 3 Watts, 238, 27 Am. Dec. 353; Dungan v. American Life Ins. & T. Co. 52 Pa. 257.

In M'Mullen v. Wenner, 16 Serg. & R. 18, 16 Am. Dec. 543, at the time of the transfer of his obligation, the obligor was not entrapped, or sought to be, by any question tending to lead him away from the point as to whether he had any defense—with his mind directed squarely to that point, he said the bonds were his and he was willing to pay them.

Edgar v. Kline, 6 Pa. 327, was the case of concealment of a defense not shown by any record importing notice, or of which the purchaser had equal means with the obligor of becoming acquainted.

Elliott v. Callan, 1 Penr. & W. 24, was the case of a new and distinct promise by obligor to pay, upon the faith of which the purchaser took the assignment of the single bill.

Decker v. Eisenhauer, 1 Penr. & W. 476, was a case of actual knowledge, and concealment of the same, of the mortgage afterwards attempted to be set up as a defense.

Chapman v. Chapman, 59 Pa. 214, was also a case of concealment of a fact known, and subsequently sought to be taken advantage of.

Griffiths v. Sears, 112 Pa. 523, 4 Atl. 492, was a case in our favor, to the extent that it holds that the purchaser of a judgment is ordinarily charged with the inspection of the record of the judgment, and is therefore, in general, affected by notice of any rights which it discloses. If charged with the inspection of the record of the judgment itself, why not also with that of any other public record affecting it?

The land having been sold to a stranger upon the paramount lien, and defendants not having in their hands, of the consideration of their purchase, a sum sufficient to extinguish the en-

cumbrance, they were not bound to extinguish it. And the phrase, "not having money in their hands," in this connection, signifies not having money that is due and payable, or in arrears, as distinguished from money not yet due by the terms of their contract. Dentler v. Brown, 11 Pa. 295; M'Ginnis v. Noble, 7 Watts & S. 454; Harper v. Jeffries, 5 Whart. 37.

OPINION BY MR. JUSTICE STERRETT:

The judgment against defendants having been opened for the purpose of permitting them to show failure of consideration of the note on which it was entered, evidence was introduced tending to show that it was given for the purchase money of land on which there was then an outstanding mortgage executed by a prior owner of the land; that in an action of scire facias afterwards brought on the mortgage, with notice to the terre-tenant, judgment was obtained and the land sold thereon to a stranger.

To meet the defense thus interposed, the equitable plaintiff introduced evidence for the purpose of showing that defendants were estopped from setting up failure of consideration as against him and his assignor Daniel Rhodes. On that subject Rhodes testified as follows:

"Before I took a transfer of the judgment, I saw Nason Rowley and had a talk with him about the judgment; had the talk before I bought it. I told him that I talked of taking the note; that Mr. Parker and I talked of trading. I should have said judgment, and I thought before I took it I would go and see what they had to say about it, and see if it was all right, and see the property. I had not been at his house before. We talked some about it. He told me what he and his son had and said that the note was all right, that it was good. I took the judgment on the strength of the statement made by Nason Rowley. If he had not made this statement that it was good I should not have taken it. . . . Mr. Rowley showed me what property they had, and in that conversation, he told me the judgment was good. In this conversation with Mr. Rowley he said there was nothing. . . . He said there was nothing against them, the place was clear. We were talking about the judgment; he said there was nothing against them, the place was clear."

In view of this and other evidence, the equitable plaintiff, in his first point, requested the court to charge: "That if prior to

the purchase of the judgment by Rhodes from Parker, Rhodes went to Nason Rowley to inquire about the judgment, and whether there was anything against it, and if there was not he would purchase it, and intended to sell it to Clark; and in answer to the inquiry Rowley informed him that it was good, and there was nothing against it; and on the faith of that representation, Rhodes purchased and paid a valuable consideration for it. Rowley is now estopped from showing that any encumbrance existed against the land for which the judgment was given, or from showing any defense to the payment of the judgment."

This point was substantially refused by the court saying: "Whether correct or not in the abstract, we say to you that there is no evidence that estops defendants from setting up the failure of the consideration of the judgment," and also charging the jury "that upon the undisputed evidence in the case, their verdict should be in favor of the defendants." In thus withdrawing the case from the jury, and directing a verdict for defendants, the learned judge erred.

The evidence on which plaintiff's first point is predicated was wholly verbal, and therefore proper for the consideration of the jury. If they were satisfied as to the truth of the facts recited in the point, the legal conclusion sought to be drawn therefrom, by plaintiff would necessarily follow; and if Nason Rowley was thereby estopped as to Rhodes, he was also estopped as to his assignee, the equitable plaintiff.

It is unnecessary to consider the remaining specifications of error.

Judgment reversed and a *venire facias de novo* awarded

Caleb N. Taylor's Appeal.

A trustee is not a competent witness as to matters between himself and a deceased *cestui que trust*, but is competent to testify as to matters between himself and living *cestuis que trustent*.

A trustee under a deed of trust holds the legal title to the trust estate; and the same is sufficient pledge to him for all legitimate advances within the terms of the trust.

Such a trustee is entitled to credit for all advances shown to have

been made within the powers conferred upon him by the deed; but not for advances which competent testimony fails to show were within such powers.

(Argued March 30, 1887. Decided October 3, 1887.)

January Term, 1887, No. 157, E. D., before MERCUR, Ch. J., TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of Common Pleas No. 1 of Philadelphia County sustaining the exceptions of the complainants to the report of a master and ordering a conveyance by the defendant to the complainants. Reversed.

This was a bill in equity, wherein Louisa M. Joyce and others, widow and children of Anthony K. Joyce, were complainants, and Caleb N. Taylor was defendant, to compel a conveyance by defendant of the title to certain real estate and an account of the rents of the same. An answer was filed with an account showing a large balance due to defendant. The matter was referred to an examiner and subsequently to a master who found, *inter alia,* the following facts:

This bill was filed by the widow and children of Anthony K. Joyce, to compel the conveyance of the legal title of certain real estate held by the defendant, Caleb N. Taylor, as trustee, under a deed made by Anthony K. Joyce and Louisa M., his wife, and for an account of the collections and disbursements of the rents since the death of Anthony K. Joyce. In 1849 Anthony K. Joyce, then a young man of twenty-three, being in embarrassed circumstances, and harassed by importunate creditors, together with his wife, Louisa M. Joyce, executed a deed of trust, dated June 21, 1849, granting and conveying all their real estate and personal property to the defendant, Caleb N. Taylor, in trust to pay their debts, and afterwards to collect the rents, issues, and income, and apply the same to the support and maintenance of the grantors, during all the term of their lives, and in case the income should prove insufficient to supply the wants and necessities of Anthony K. Joyce and Louisa M., to sell or mortgage, as occasion may arise, all or any portion of the real estate, provided that the said Anthony K. Joyce or Louisa M., his wife, shall have no power to sell or encumber any of said real estate; nor shall any part of the same, or the income of the same, be liable in any way for any of the debts, contracts, or

engagements which they may make hereafter. And from and immediately after the decease of the said Anthony K. Joyce, to convey and transfer all the trust estate and effects, the widow's dower excepted, remaining in his hands, to such persons as the said Anthony K. Joyce should by will appoint, and on failure to appoint, to such as would be entitled under the intestate laws.

At the time of this conveyance the real estate belonging to Joyce, or in which he had an interest, consisted of two stores on Minor street, and the remainder in one on Market street, to take effect on the death of his aunt, Anne Rusk, provided he should be then living.

The defendant accepted the trust, satisfied the debts, collected the rents and income, and paid them to the beneficiaries.

The income, however, which originally was only $600, and never exceeded $1,000, proved utterly inadequate to supply the wants and necessities of the grantors in the maintenance and support of themselves and family.

At the solicitation, therefore, and upon the request of Joyce, the defendant from time to time advanced considerable sums in excess of the income, which were expended by the former in the support of himself and family.

In 1854 Joyce occupied a store belonging to the defendant, where he carried on the business of selling coal, and afterwards in 1858 he removed to and occupied a farm of 140 acres in Bucks county, also belonging to the defendant, on which he continued to reside with his wife and family until the year previous to his death.

For the above store and farm, the trustee charged in his account the respective rents of $250 and $800 per annum.

After the death of Anthony K. Joyce the defendant still continued to act, nominally, as trustee, no objection being made either by the widow or her children, collected the income from the estate, and paid it over to the widow, by whom it was expended in supporting herself and family until some time in 1877, when defendant surrendered all active management of the estate.

It was to the admission of the defendant as a witness, and to the charges made for the rent of the store and farm, as well as to all payments in excess of the income, that the complainants objected before the master.

They contended that these payments and charges were not available against the parties in remainder under the powers in the deed. That the trustee was limited in his payments to the life tenant to the actual income, and that many of the payments being only evidenced by checks to the order of Joyce, and by notes of the latter paid by checks, were inadmissible as claims upon the estate.

It was also alleged that there was an understanding between Joyce and the defendant that the former was to occupy the store and farm free of rent, and afterwards sell them and receive all that they realized above the original cost, and finally that the payments made to the widow were after the termination of the trust, and therefore invalid as against the children. There were besides specific objections as to certain items in the account.

The questions raised were:

1. Was the defendant competent as a witness? Found: that as to all matters relating to his own discharge he is incompetent.

2. Were the payments in excess of income authorized by the deed, and is the trustee entitled to reimbursement out of the estate? Found: that payments were authorized by deed, and trustee entitled to reimbursement.

3. Was the rent of the store and farm a proper charge and entitled to payment? Found: that rent of store and farm were proper charges and entitled to payment.

4. Is the trustee entitled to credit for the payments made to the widow since the death of Joyce? Found: that trustee is entitled to credit therefor.

5. Is the account as it stands correct?

Found: that an item of $101.97 for which no voucher was filed nor explanation given, should be disallowed; that the other item of credit appeared to be properly established, and that crediting the estate with $1,303.77, at the trustee's request, there is due to the defendant $32,645.40, with interest from October 11, 1884, which is a valid claim upon the estate and entitled to payment thereon.

The master thereupon submitted a decree in accordance with his conclusions.

Complainants' exceptions to this report were sustained by the court which ordered conveyance to complainants, of the title to the real estate held in trust by the defendant, in accordance

with the prayer of the bill, and directed the costs of the proceeding to be paid by the defendant.

A decree was entered accordingly; and the defendant took this appeal, assigning for error the decree of the court.

H. La Barre Jayne, Arthur Biddle, and *George W. Biddle,* for appellant.—The trustee was a competent witness.

The exception to the enabling act of 1869 is that "this act shall not apply to actions . . . where the assignor of the thing or contract may be dead;" and the point is Was Joyce the assignor within the meaning of the act?

We must remember that although the words of the act, if strained, might exclude the testimony of a party, where any assignor was deceased, yet the supreme court has not so held, but restricted them to the case of an assignor with whom the witness made the contract disputed, that is, whose estate might be affected; *viz.,* increased or diminished by the result of the action. Pattison v. Armstrong, 74 Pa. 476. See also Hostetter v. Schalk, 85 Pa. 220.

No objection should be made to the competency of a witness upon the ground of interest, unless he were directly interested in the event of the suit, or could avail himself of the verdict on any future occasion in support of his interest. Doddington v. Hudson, 1 Bing, 257.

In Nowell v. Davies, 5 Barn. & Ad. 368, an action against executors for a debt of a testator, a person entitled to an annuity under the will was held not disqualified by interest from giving evidence for the defendants. See also Paull v. Brown, 6 Esp. 34; Davies v. Davies, Moody & M. 345.

In Schnable v. Koehler, 28 Pa. 181, it was held, in an action for injury to the reversion, a tenant of the plaintiff has no such interest as excludes him from being a witness for his landlord. See also Musser v. Gardner, 66 Pa. 242.

In this deed of trust the settlor conveyed his whole estate to Joyce, reserving the right to use, in the discretion of the trustee, for his wants and necessities, not only income, but also principal, together with the right to appoint by will, and on default of a will to go to his lawful heirs.

But in Mackason's Appeal, 42 Pa. 330, 82 Am. Dec. 517, this court held that one *sui juris* cannot, as against either prior or subsequent creditors, settle his property in trust for his own life,

and to his appointees by will, or on default to his lawful heirs; although in Ashurst's Appeal, 77 Pa. 464, such a trust was obviously held good as against the settlor only.

It is clear, therefore, that the deed of Anthony K. Joyce and his wife was inoperative in regard to subsequent creditors; and it is submitted that any creditor could have forced the trustee by a bill in equity to pay any debt that Joyce should contract. Again; this trust bears no analogy in any respect to a valid spendthrift's trust.

Though it is evident that the trustee always intended to charge for his advances, it by no means follows that a previous intention not to do so, when he thought the estate was insolvent, would preclude him afterwards from altering his mind. Strawbridge's Appeal, 5 Whart. 568. See also Reck's Appeal, 78 Pa. 432.

There was no specific contract between the trustee and Joyce, but the former's claim for rent is based upon the use of the premises by the latter.

And in National Oil Ref. Co. v. Bush, 88 Pa. 335, this court held that the action of assumpsit for rent is not necessarily founded upon any specific agreement by the tenant, oral or written, to pay rent, but upon the use of the land, and will lie against the occupant although he be a trespasser, the owner having the right to waive the tort and sue in assumpsit.

In Spackman's Appeal, 16 W. N. C. 79, the niece of a decedent presented a claim for rent for the use and occupation of her property, and it was allowed; the court saying that the mere fact of the use and occupation would between strangers create a liability, and the relationship of uncle and niece would not suffice to rebut this implied presumption. See also Strawbridge's Appeal, 5 Whart. 568.

A trustee is under no special duty to voluntarily inform the remainder-men of the exact amount of his claims for advances against the estate; nor has he a special right to reimburse himself for such, by retaining portions of the income as it passes through his hands, until final settlement. And it has never been held that the trustee either forfeits or waives his legal right to reimbursement by such omissions, although it would, perhaps, be more prudent, should the trustee not have omitted to do so. Dilworth v. Sinderling, 1 Binn. 488, 2 Am. Dec. 469; Strawbridge's Appeal, 5 Whart. 568; Wister's Appeal, 86 Pa. 160.

It was also argued that the statute of limitations and the presumption of payment must prevail against the trustee. But how can this be so, when the trustee holds the title as a lien for his advances, as in Dilworth v. Sinderling or in Strawbridge's Appeal, where the lien was held to exist?

The courts hold that necessaries are not the bare needs of life; not only such as are absolutely necessary to support life, or to keep out the winter's cold, but such as are suitable to the person's degree and estate; and it must be left to the jury (or here for the master) to decide whether they were so or not, and whether furnished at reasonable prices; and they will apportion their damages accordingly. Peters v. Fleming, 6 Mees. & W. 42; Rundel v. Keeler, 7 Watts, 237, and cases cited.

In Dilworth v. Sinderling, 1 Binn. 488, 2 Am. Dec. 469, the trustee advanced £200 to the *cestuis que trust* to assist them in commencing a trade, and it was allowed by the court. See also Lowe v. Griffith, 1 Scott, 458; Coates v. Wilson, 5 Esp. 152; Hands v. Slaney, 8 T. R. 578; Rundel v. Keeler, 7 Watts, 237; Helps v. Clayton, 10 Jur. N. S. 1184; Mohney v. Evans, 51 Pa. 80; Breed v. Judd, 1 Gray, 455.

In Hill v. Arbon, 34 L. T. N. S. 125, an infant, the sole manager of a farm belonging to his father, and having some expectations, bought on credit one pair of spurs, a suit of best made kersey hose clothing, a breastplate, a set of best plated harness, etc.; held necessaries. COCKBURN, Ch. J., said: "Here, considering the position of the young man as manager of the farm, that he was nearly twenty-one and had expectations, the goods supplied were of a character which a farmer's son might reasonably require."

An infant may bind himself as apprentice by indenture, because it is for his benefit. Rex. v. Arundel, 5 Maule & S. 257; Keane v. Boycott, 2 H. Bl. 511; Cooper v. Simmons, 7 Hurlst. & N. 707.

John G. Johnson, for appellees.—Taylor was not competent as a witness to establish contracts with Joyce, the latter being deceased. Hostetter v. Schalk, 85 Pa. 220; Graves v. Griffin, 19 Pa. 176; Karns v. Tanner, 66 Pa. 297; Gardner v. McLallen, 79 Pa. 398; Ewing v. Ewing, 96 Pa. 381; Hunt's Appeal, 100 Pa. 590; Murray v. New York, L. & W. R. Co. 103 Pa. 37; Fross's Appeal, 105 Pa. 258; Foster v. Collner, 107 Pa. 305; Henry v. Com. 107 Pa. 361.

It is incumbent on every trustee who sets up, as against his *cestui que trust,* the notes of the latter, to do more than prove the signature thereto. He must show the actual receipt of a full consideration by the maker. It is very certain that Joyce never received the proceeds of the checks with which the notes were taken up; and there is no proof whatever that he ever received the original consideration of the notes. Wistar's Appeal, 54 Pa. 63.

The deed of trust provided for a devestiture of his title upon the decease of Joyce, and made no provision for a lien for advances. Only one mode was pointed out in which these could be charged upon the land, namely: by the exercise of the power to mortgage.

Purchasers, by the giving of such a mortgage, would be warned of the existence of a lien. By its giving, the title upon the death of Joyce would pass to the remainder-men encumbered. Had such a mortgage been executed there would have been a notification to the *cestuis que trust* of the necessity of economy, and there would have been no such ruinous accumulation of unpaid interest as is now claimed. Palmer v. Wakefield, 3 Beav. 227.

There was no advance made by Taylor upon the faith of the deed of trust. The indebtedness did not arise by way of such advances. He dealt with Joyce as he would have dealt with any other debtor, lending his money upon the security of notes and checks, and renting his places of business upon the personal credit of the lessee. He took no mortgage to show that he dealt upon the faith of the deed—which alone would establish the fact that he did so deal. On the contrary, the very fact of his taking promissory notes showed that he dealt upon personal credit. Raybold v. Raybold, 20 Pa. 308.

Upon the death of Joyce in 1868 the legal as well as the equitable title vested in the children, subject to the dower of the mother. No title thereafter remained in Taylor, and there was nothing therefore upon which the reported lien of debts could attach. Bacon's Appeal, 57 Pa. 504.

It may be that the statute of limitations is simply a bar to the recovery of a debt by the parties who set it up, and that it does not apply where there has been a pledge for an unfulfilled purpose; but the failure to sue for twenty years raises a presumption which is evidence of payment. It may be that the

pledgee of a specific thing, for a specific purpose, may legally refuse to deliver the pledge after six years; but, after twenty years, he may not do so, for then a presumption of payment has arisen.

In the well known case of Patton's Estate, 2 Pars. Sel. Eq. Cas. 103, it was held that because of such possession an assignee for benefit of creditors could be compelled to reconvey. There was no evidence in this case to rebut this salutary presumption.

Had Taylor taken a mortgage there would have been a presumption of payment after twenty years which could only have been rebutted by positive proof to the contrary or by evidence of an acknowledgment. Is he better off because he took no mortgage?

In King v. Coulter, 2 Grant Cas. 77, the supreme court held nonpayment for but fifteen years under circumstances much less conclusive than the present as to nonindebtedness to be evidence from which a jury might infer payment. The remarks of Judge WOODWARD well merit careful consideration in this connection.

OPINION BY MR. JUSTICE GREEN:

We are quite clear that the defendant was an incompetent witness as to any matters between himself and A. K. Joyce during his life, but entirely competent as to any matters between the complainants and himself after Joyce's death.

On the construction of the deed of trust we are unable to agree with the learned court below in all respects. The claims of the defendant for rent of the store and farm, it seems to us, are within the provisions of the trust. The requirements, both for shelter and occupation, are embraced within the meaning of either of the words wants or necessities and the express terms of the trust enjoined upon the trustee the positive duty of supplying the wants and necessities of Joyce and his wife during all the term of their natural lives.

That duty demanded the expenditure not only of the rents, issues, and profits of the real estate, but also the appropriation of the real estate itself, if necessary. It is true a sale or mortgage of the real estate were the methods indicated in the deed of trust for getting at its available product; and the power to mortgage was duly exercised by the trustee within the very letter of the trust and up to the full mortgage value of the property.

Of course the trustee might have sold the real estate, and thus have left the trust barren of a subject, and avoided the present litigation. But it would have involved the sacrifice of the trust property, and would have wrought distress to the principal *cestui que trust,* and much loss to the present complainants. The trustee adopted a more kindly and, as the result proved, a wiser course, and one which has proved far more advantageous to these plaintiffs. He paid the debts of Joyce, made advances of money to him, started him in the store business, and, when that proved a failure, placed him on one of his own farms where he lived a number of years supporting his large family out of the farm products to a considerable extent. In his account the trustee claims credit for rent of the store at the rate of $250 per annum and $800 for the farm. These amounts the master found to be reasonable charges; and an examination of the testimony of quite a number of witnesses other than the defendant fully sustains his finding.

The master allowed these claims but the court disallowed them, for the reason, substantially, that they were not founded upon a literal execution of the powers conferred by the deed of trust. In other words they simply represented an indebtedness due upon contracts made with the *cestui que trust* subsequently to the making of the deed, and for all such indebtedness as that the deed expressly provided there should be no liability of the trust estate.

There is much force in this view of the subject, and we are of opinion that it must be applied to some of the items for which credit is claimed. But we do not agree that it must necessarily be enforced as to the claims for rents, or rather for the price of the occupancy of the real estate in possession of which the *cestui que trust* was placed by the trustee. If the trustee had leased these premises from strangers, and had paid the rents, it could not have been denied that the payments were for necessaries. Of course Joyce and his family must have suitable shelter, and of such a character as to enable him to prosecute some kind of calling.

It is perfectly manifest that the income of the Minor street property which was but $600 for several years, and out of which had to be paid interest on a $5,500 mortgage and taxes and repairs, was not, and could not be, sufficient for the maintenance of Joyce and his family.

The remainder in the Market street property did not fall in until April, 1867, nearly eighteen years after the deed of trust was made. The rent of the Minor street store was but $600 per year until 1855 and then only rose to $750 until 1861; and it was necessarily inadequate after fixed charges were defrayed, for the support of Joyce and his family. What then was the duty of the trustee under his quite broad powers? He might have sold the real estate and had a mere trifle left after payment of the mortgage, or he might have used the rents to support the family, and neglected to pay interest and taxes and thus brought on the forced sale of the property under the mortgage; but he did not do this. He paid the interest and taxes and other expenses, and indeed went beyond those limits and made advances and took promissory notes from Joyce part of which proved a loss. The notes representing indebtedness from Joyce to Taylor are produced, and credit is claimed for them in the account; but as they are not supported by evidence showing that they were given for any indebtedness which it was within the power of Joyce to create so as to make it a charge upon the trust estate they must be rejected.

So far we agree with the learned court below. As to the claims for rent, viewing them as claims for necessaries which were furnished by the trustee, we do not perceive the necessity of a technical execution of a mortgage upon the trust estate in order to sustain them or preserve them. The trustee could not give a mortgage to himself, and it was not necessary to do so as he held the legal title to the trust estate, and that was a sufficient pledge to him in his position for all legitimate advances within the terms of the trust.

The plea of the statute of limitations is not applicable for the same reason. The question is, on what terms must the trustee now transfer the legal title? And equity will not compel him to convey it, except upon reimbursement for such of his claim as is legitimately within the powers conferred upon him by the deed. We see no objection to the allowance of the claim for over payments made to the widow after Joyce's death. It cannot be doubted that he continued to act as trustee for a number of years after the death of Joyce by the express consent of the widow and children; and the deed in terms required that the trust should continue during the lives of both Joyce and his wife. There is nothing in the evidence to call in question the

perfect good faith of the trustee in continuing in the trust after Joyce's death. His receipts during several years while he so continued to act were very considerable and are not fairly to be questioned as to their character. They appear to be within the trust and are really not challenged in their details.

It is true that the trustee was derelict in not filing his accounts and especially in not having a settlement with the widow and children after Joyce's death. But they also were derelict in not calling him to account. Instead of doing this they clearly assented to his continuance in the trust, and have had the benefit not only of his services as trustee but of the large advance in the value of the trust estate which was preserved to them by his method of administering the trust. As he will lose a considerable portion of his claim in consequence of his delay in the settlement he is the severest sufferer from that cause.

Without elaborating more fully upon the details of the controversy we think it sufficient to say that the account as adjusted by the master should be corrected by striking out the credits for the two checks for $1,500 and $300 dated the 3d and 21st of March, 1854, paid to Joyce to start him in a store, and certain notes a list of which appears in the printed argument for appellees at page 6, together with all sums of interest charged on all of said items, and confirming the report as to the remainder of the account as found by the master.

Decree reversed and record remitted with directions to correct the account in accordance with the foregoing opinion, the costs of this appeal to be paid by the appellees.

Henry Erwin, Appt., *v.* Hannah Hoch.

To ascertain the intention of the parties to a contract all the surrounding facts and circumstances existing at the time the contract was made may be taken into consideration.

Cited in Kaul v. Weed, 203 Pa. 586, 593, 53 Atl. 489.

NOTE.—If the lease gives the right to take only certain minerals, the lessee is limited to such. Thus if the right is to take oil alone, no right passes to gas (Kitchen v. Smith, 101 Pa. 452; Palmer v. Truby, 136 Pa. 556, 20 Atl. 516); or to take soapstone only, gives no right to take other minerals (Verdolite Co. v. Richards, 7 Northampton Co. Rep. 113). See also Kier v. Peterson, 41 Pa. 357; Watterson v. Reynolds, 95 Pa. 474, 40 Am. Rep. 672; Clement v. Youngman, 40 Pa. 341. If the right is doubtful, the question is for the jury. Ford v. Buchanan, 111 Pa. 31. 2 Atl. 339.

Where a lessor has an exclusive right to the iron ore in a tract of land with a right to wash the ore on the premises, and it was not known at the time the lease was executed that ocher existed in the land the lessor has no right to appropriate to his own use the ocher accumulated in the washings of the iron ore.

(Argued March 3, 1887. Decided October 3, 1887.)

January Term, 1887, No. 330, E. D. All the judges present. Appeal from a decree of the Common Pleas of Berks County in favor of plaintiff in a bill in equity. Affirmed.

Bill in equity filed by Hannah Hoch against James F. Dumm, H. J. Detwiller, Franklin Shaefer, Hiram Gamler, Jr., William Schlegel, and Henry Erwin. Heard on bill, answer, replication, and proofs taken by a master.

The court sustained exceptions to the master's report and filed an opinion, of which the following is an abstract, in which the facts are stated:

The master finds that on September 7, 1877, Hannah Hoch, plaintiff, leased to James F. Dumm, one of the defendants, for the term of fifteen years, the exclusive right to all the iron ore in a certain tract of land with the right to search, explore, excavate, dig, and carry away, and the right to wash on said premises such ore as shall require washing.

Mr. Dumm took immediate possession, and at once commenced mining. After continuing in this manner about one year, he assigned the lease to the Topton Iron Company. This company afterwards assigned the lease to Henry Erwin, who still holds the same, who continued the mining and washing. During these several years that the ore was washed on the premises, large deposits of refuse matter accumulated in the mud dam. Erwin, the present lessee, proposed to use this refuse material in the manufacture of paint, and commenced to remove it from the dam, when Mrs. Hoch, the lessor, on November 30, 1885, filed this bill, and obtained an injunction to restrain him and his employees from so doing.

The plaintiff alleged, in her bill, that this deposit was composed of clay, ocher, and mineral substances other than iron ore, of great commercial value, used both as paint and as material used in the manufacturing of paints and pigments, and hence not within the lessee's rights under the lease.

The defendants, in their answer, assert that the substance

which the plaintiff calls "clay, ocher, and mineral substances other than iron ore," is an iron ore in a fine state of division, and therefore, under the terms of the lease, they have the right to dig, mine, and haul it away.

Is the refuse material in the mud dam iron ore? If so, the defendants have the right to take it away; but if it is not, then then they have no such right, and the injunction must be continued.

To ascertain the real intention of the parties, all the surrounding facts and circumstances may be taken into consideration when the contract was made. (Ocher was not then known in the neighborhood.)

When they said clean, merchantable iron ore, clean and merchantable for what purpose? Manifestly, clean, merchantable iron ore for the popular and universal purpose for which iron ore, as such, at the making of the lease, was used and employed. This certainly is the popular meaning—the meaning intended by the parties. There is nothing in the lease to show that the words were used in any but their ordinary sense. On the contrary, the contents of the lease confirm this interpretation by defining and determining what the parties meant by clean, merchantable iron ore, by the provision for the separation of the iron ore by washing on the premises.

We have in their acts a determination by the holders of the lease as to what was intended by the phrase "iron ore," as iron ore, as used in the manufacture of iron. This is its sole use. When its use is to be applied to some other purpose, it passes under some other name.

We think this interpretation of the words "iron ore" is sustained by Kemble Coal & I. Co. v. Scott, 15 W. N. C. 220.

Again, when the parties were contracting for and about iron ore, they must be taken to have meant something that could be properly used in an iron furnace.

With this interpretation of "iron ore," will the refuse matter in the mud dam fall within or without this definition?

To support defendant's claim, witnesses were examined to show that scientists classified ocher as iron ore. An expert testified in regard to a sample from the slush dam: "It is, I believe, and it is known commercially as ocher." Erwin, the present lessee, said, speaking of the material from the slush

dam: "I powder and sell it as it is to paint grinders. I sell it as ocher. If I bought this sample, I would sell it as ocher."

With these views it is not necessary to discuss the right of the defendants to take away the contents of the mud dam, nor is it necessary to decide the question of an equitable estoppel contended for by the plaintiff.

The court entered a decree sustaining the exceptions filed to the master's report and granting a perpetual injunction against the defendants restraining them from mining and removing from the premises any clay, ocher, or any mineral substance other than iron ore.

The assignments of error specified the action of the court in sustaining the exceptions to the master's report, in disapproving the master's recommendations, in not dismissing the plaintiff's bill, and in entering the decree for a perpetual injunction.

Jeff. Snyder and *Geo. F. Baer,* for appellant.—The holder of the lease has the exclusive right for the term of the lease to take from the premises all the iron ore of whatsoever variety, wherever found, and in whatever shape or condition it may be. He may wash such ore as he chooses, on the premises or off the premises; or he may remove it and dispose of it without washing it. He may dispose of the ore as he sees proper; he may use it himself, or sell it for the manufacture of pig iron, for the manufacture of paint, or for any other purpose whatever. He may remove it and sell it in any state of impurity, but the price of the royalty per ton is determined from the value of the ore at the point of time when it passes from the hands of the miner into those of the manufacturer. He may, under the terms of the lease, remove the material deposited in the mud dam.

The material in the mud dam is within the very words of the grant. These words are the lessor's words; and when she conveyed the exclusive right to all the iron ore in her land, without reservation or qualification, she must be taken to have meant what she said. If there was a kind of ore, or a variety of ore, a lower grade of ore, ore in such a fine state of division and so low in iron that the furnace companies would not want to use it, and she intended to withhold this from use, she should have said so, in some way. If we were to take only what could be used in a furnace, she could have said that. But she says we, exclusively, may take it all.

The law presumes that every man intends the legal consequences of his words. Hale v. Fenn, 3 Watts & S. 361.

But if there is any doubt about the meaning of the words "the exclusive right to all the iron ore," how can the grantor come into a court of equity and ask the chancellor to limit the scope of her own words?

"It is a fundamental rule in the interpretation of a deed or lease that it be taken most strongly against the vendor or lessor." Trout v. McDonald, 83 Pa. 146. See also 2 Bl. Com. 380; Hartwell v. Camman, 10 N. J. Eq. 134, 64 Am. Dec. 448.

The lease grants to us the exclusive right to all the iron ore in the ten acres of land; yet the learned judge, sitting as a chancellor, places upon this grant, at the instance of the grantor, such a construction as will prevent us from taking away from these premises a thousand tons of metallic iron already mined.

There is another ground upon which the appellant's title to the mud dam deposit can be maintained.

"It is a well settled rule that when anything is granted, all the means to obtain it, and all the fruits and effects of it, are granted also, and all shall pass inclusive together with the thing by the grant of the thing itself." Griffin v. Fellows, 81* Pa. 123. See also Noy, Maxims, 198; Kier v. Peterson, 41 Pa. 357; and Kitchen v. Smith, 101 Pa. 457.

Ermentrout & Ruhl, for appellee.—The primary object of the chancellor is to determine the intention of the parties, when they entered into the contract. In arriving at that intention the surrounding facts and circumstances, as well as the knowledge of the parties, as to the subject-matter, must be taken into consideration.

In addition to the authorities referred to by the learned judge, we would cite: New Jersey Zinc Co. v. New Jersey Franklinite Co. 13 N. J. Eq. 342; Smart v. Morton, 5 El. & Bl. 30.

At the time of the execution of the contract, neither of the parties to the lease knew of any other use to be made of iron ore than in the manufacture of metallic iron.

In fact it is not contended by the appellant that there was anything known of the existence of ocher in that section of country, prior to 1881. The use to which iron ore was put was well known and understood by the parties to the lease. They were contracting for and about iron ore; the use to which such

iron ore was then put must have been contemplated by them. Kemble Coal & I. Co. v. Scott, 15 W. N. C. 222.

OPINION BY MR. JUSTICE STERRETT:

In construing the article of agreement under which this contention has arisen and holding that under its provisions appellant, as assignee of the contract, has no right to dispose of the refuse deposited in the mud dam, we think the learned judge of the common pleas was clearly right; and, for reasons given in his opinion, accompanying the record, the decree should be affirmed.

Decree affirmed and appeal dismissed, at the costs of appellant.

Appeal of Samuel L. Kauffman in Right of His Wife, Catharine Kauffman.

Where an estate consisted of $40,000 of which $7,000 was in cash and $33,000 in unconverted securities which the heirs agreed to take without conversion, and where the administrator has done nothing but make a few small disbursements and collect a few small claims, without litigation, $1,600 was held a sufficient compensation.

Where a son was indebted to his father's estate on notes more than six years due and refuses to plead the statute of limitations, an attaching creditor of the son will not be permitted to plead the statute for him.

Where a widow had agreed with the heirs to release to them her share of the personalty of her husband's estate, in consideration of $6,000 in cash and the occupancy of the real estate for life, the portion of the personalty released is not a part of the decedent's estate, but is a payment by the widow for her life estate in the realty.

(Argued May 19, 1887. Decided October 3, 1887.)

January Term, 1887, No. 406, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Orphans' Court of Lancaster County confirming the report of an auditor. Reversed.

The auditor, Charles Dennes, Esq., found facts as follows:

Adam Rockafield died July 18, 1885, intestate, leaving surviving him, a widow, Catharine Rockafield, and the following named children, to wit: Catharine Kauffman, wife of Samuel

L. Kauffman; Rachael Scott, wife of Francis M. Scott; Hetty Leaman, wife of —— Leaman; Emma Keech, wife of James B. Keech; A. J. Rockafield; Adam S. Rockafield, and three grandchildren.

The account presented, and received in evidence, which was confirmed nisi, June 21, 1886, by the orphans' court, showed a balance of $40,134.99 due the estate, and included the excess of the indebtedness of A. S. Rockafield over his share in this estate.

Exceptions were filed, by William R. Wilson, Esq., attorney for Rachael Scott, one of the heirs, July 16, 1886, in which A. F. Hostetter, attorney for Catharine Kauffman, one of the heirs, joined, to the credit of $2,000, as commissions of accountant, as exorbitant in amount."

In the inventory were included two promissory notes, one appraised at the sum of $1,100, and the other, with interest to October 1, 1885, at the sum of $2,725; the two notes, according to inventory, amount to the sum of $3,825.

The $1,100 note is dated April 15, 1869, payable one year after date, to Adam Rockafield, the decedent.

The other note for $2,000, on which interest is calculated, amounts to $2,725 as above stated, and is dated July 1, 1878, payable one year after date, to Adam Rockafield, the decedent.

To both of these notes, given by Adam S. Rockafield, a son and one of the heirs of Adam Rockafield, the decedent, Geo. Nauman, Esq., attorney for Robert McClure (an attaching creditor of Adam S. Rockafield), administrator of Dr. John Martin, deceased, pleads the statute of limitation.

Mr. Nauman offered in evidence a judgment of John Martin against Adam S. Rockafield (one of the heirs), to January term, 1870, No. 1245.

The judgment on which the attachment was issued was entered April 9, 1870.

A sci. fa. to revive the judgment was issued November 5, 1885, and on the same day the death of the plaintiff was suggested, and Robert S. McClure, his administrator, was substituted on the docket of the court of common pleas. The scire facias was returned "nihil." On November 19, 1885, an alias scire facias was issued and judgment thereon entered January 20, 1886, to December term, 1885, No. 42, for $774.76. Attachment *ad. lev. deb.* was issued October 6, 1885, against Adam

S. Rockafield, as defendant and A. J. Rockafield, administrator of Adam Rockafield, deceased, as garnishee.

In the case before us, the estate is perfectly solvent; and the attaching creditor, or his representative, is not a creditor of Adam Rockafield, deceased, but a creditor of Adam S. Rockafield, a son, and one of the distributees of the estate of said Adam Rockafield, deceased.

The maker of the two notes mentioned did not interpose the statute of limitations, nor anyone for him. On the contrary, he authorized his brother, A. J. Rockafield, to employ counsel for him, with instructions that he did not wish to plead the statute, in fairness to the other heirs; that he always understood that these sums were given to him as advancements by his father; that he was advanced to a greater amount than his share in the estate. Now as to advancements: the maker, so far as the auditor knows, does not and did not claim anything from his father's estate, because he has nothing to get, by reason of having received from his father the several amounts, or sums of money represented by these notes, as stated and acknowledged by himself. Taking all the circumstances and evidence in regard to the notes, the auditor is of opinion that the two above-mentioned notes, as well as the note for $1,400, dated September 7, 1883, and identified "C. D. No. 5," should be deducted from or set off against the share of A. S. Rockafield, the maker of the note, and so decides.

An agreement between all the heirs and widow of the deceased, dated October 2, 1885, stipulated among other things that the heirs leased to Catharine Rockafield, the widow, ten acres of land, more or less, etc., for the term of her natural life, from the time of her husband's death; and the widow releases all her right, title, and interest, in and to so much of her share of the personal estate (except what is therein conveyed to her) of her said husband, deceased, as exceeds the sum of $6,000, and upon the payment to her of the said sum of $6,000, distribution of the estate remaining to be made according to the intestate laws of the commonwealth of Pennsylvania, among the parties of the first part in the proportions to which they are entitled.

After considering the law as applicable to commissions in such cases, and all the circumstances connected with the administration of the estate, the auditor is of the opinion that the $2,000 commission charged is excessive; and the exception to this item

is sustained, and the commission fixed at the sum of $1,600 — which sum, the auditor is of opinion, is a fair and ample compensation under the circumstances.

The indebtedness of the defendant in the attachment to the estate being greater than the share coming to him from this fund, and hence no funds to which A. S. Rockafield is entitled are in the hands of A. J. Rockafield, the garnishee, nothing is awarded to the attaching creditor.

Exceptions filed to the auditor's report were partially sustained by the court in the following opinion, delivered by LIVINGSTON, P. J.

The exceptions may properly be divided into two classes:

(1) Those relating to the commissions of the accountant;

(2) Those relating to the distribution of the fund among the heirs, and especially with reference to the share of Adam S. Rockafield, a son, and the attachment issued against him.

As to the first, the account shows that the administrator charges himself with the whole amount of the inventory, and with moneys received, interest on investments, etc., since filing the inventory, in all $42,787 60

And takes credit only for payments made, expenses, commissions, etc. 2,652 61

Leaving the balance to distribute $40,134 99

The administrator in his account has charged as commission $2,000, being less than 5 per cent.

In this case there were no trusts created by the will; the whole personal estate was to be collected and distributed, and the administrator gave bail and took upon himself the responsibility of the administration of the estate according to law; and he has so administered it that there has been nothing lost. A considerable portion of this personal estate was invested in judgments and mortgages by the decedent in his lifetime. Most of these investments were so judiciously made, so good and satisfactory, and the percentage of interest so advantageous, as to make them desirable to have and to hold as investments; and knowing this, and desiring to benefit the heirs, and increase the estate, by permitting the interest to run, the administrator had his "counsel write to the heirs, to see which of the securities they wanted to take as part of their shares, because it would increase the size of

the estate, by keeping the securities bearing interest," and he then collested all those which the heirs did not wish to take, some of which, amounting to $1,300, were not good; he succeeded in collecting them, however, and now, because he permitted them to take, as cash, investments already made for them, without any exertion on their part, safe investments, paying good interest, some of them desire to deprive him of the customary compensation, or commission, and wish the court to count the days, perhaps hours, the administrator was actually engaged in settling the estate, and let him be compensated in accordance therewith; and we are referred to Montgomery's Appeal, 86 Pa. 230, and cases of like character, in which trusts were created by will, in which the investments made by the testator were directed by him to remain, and not be collected by the executor in settling the estate, and on which the executor had charged commissions or compensation for collection, and on which the supreme court say he will be entitled to compensation when collected, under the provisions of the will, and that the anticipating of the compensation, which may result from future services, is not commendable.

And yet this rule does not seem to be an iron or inflexible rule, even in the supreme court, for in Davis's Appeal, 100 Pa. 201, decided since Montgomery's Appeal, the testator by his will provided that the principal of his estate should be and remain securely invested, and that all the interest and income thereof should be given to and equally divided between his four children and two grandchildren, etc.

The assets of the estate amounted to $28,202.67. The executor upon filing his account appeared to have in his possession a balance of $25,737, of which $25,000 remained unconverted, in the same securities left by the testator. The court below awarded the executor a commission of 5 per cent on this balance, and the supreme court says: "On the subject of commissions, we see no sufficient reason for interfering with the action of the auditing judge and the orphans' court."

But cases of this character are entirely different from the one now before the court. Here there are no trusts, no investments ordered to be made or kept; the estate was to be administered, and after paying debts, the balance to be paid over by the administrator to the heirs. The administrator has so managed the estate that not a dollar of the *corpus* has been lost, and the great

body of it has been bearing interest continuously, to the great advantage of the heirs; had he proceeded to collect, without giving them an opportunity of selecting such securities as they desired, as cash in the distribution, the interest would have ceased, the money been in bank, and they would not receive good securities bearing interest from the moment distribution is made. In other words, the securities which the administrator retained unconverted, he retained for the accommodation and benefit of the heirs desiring to take them.

It cannot be expected that an administrator will keep an account of every day, hour, and minute he is actually engaged in the business of settling an estate, so as to be paid so much per diem. The courts have said (Rhodes's Estate, 33 Phila. Leg. Int. 168) that not only the time, labor, and responsibility incurred in the settlement of an estate by an administrator, but the success also of his management is compensated. The rule fixing the compensation at 2½ per cent on real estate and 5 per cent on personal estate (which is the only rule fixed in Pennsylvania), should not be departed from except for good cause. Skinner's Estate, 4 Phila. 189.

The burden of proof that compensation should be less than custom has fixed is upon the exceptant. Watson's Estate, 6 Luzerne Legal Reg. 13.

In Eshleman's Appeal, 74 Pa. 42, the estate was large and the usual rule was adopted by the supreme court.

In Perkins's Appeal, 16 W. N. C. 125, the capital of the estate was about $22,000. The trustee held the fund about a year, without any further labor than collecting the income. In his account he claimed $100, for professional services rendered the estate before his appointment, about $225 (being 5 per cent) for collecting the income, and $1,500 as compensation for services as trustee, all of which were allowed by the auditor. Exceptions were taken, and the court below reduced the compensation of the trustee to 5 per cent on the amount of the estate and income. The supreme court said the court below erred in so doing, reversed the court below, and confirmed the report of the auditor.

We have found no case in which the court says that the 5 per cent for personal and 2½ per cent for real estate rule or custom is not a safe and proper general rule or custom for fixing compensation of executors or administrators. Those extraordinary

cases in which we find it departed from only fix the fact that it is not an inflexible rule or custom. We, therefore, are of opinion that the learned auditor erred in reducing, arbitrarily, and without sufficient proof by exceptants, the compensation of the administrator, and find that the exception to his so doing is sustained, which leaves the compensation as charged in the account, $2,000.86.

In this case, we think, the learned auditor has not erred in finding that the attaching creditor of Dr. A. S. Rockafield is not in a position to plead the statute of limitations against the claim owing by the debtor to the estate of his father—the debtor, Dr. Rockafield, being alive, acknowledging his indebtedness, and refusing to plead the statute himself.

In Kittera's Estate, 17 Pa. 422; Ritter's Appeal, 23 Pa. 96, and in kindred cases, the claimants were themselves creditors of the estates being distributed, direct, and as to their right to interpose the statute, there could scarcely be a question.

In Milne's Appeal, 99 Pa. 483, the share of A. J. Buckner, Jr., in the estate of A. J. Buckner, Sr., deceased, was attached by a creditor of A. J. Buckner, Jr. A. J. Buckner, Jr., was dead and could not, as Dr. A. J. Rockafield in the case before us does, acknowledge his indebtedness, and refuse to plead the statute as to the claim of the estate against him; and in that case his creditor was permitted to plead the statute.

Where a debtor is alive and acknowledges his indebtedness, and refuses to plead the statute, he cannot be compelled to plead the statute of limitations against one of his creditors for the benefit or advantage of another creditor. Nor can one of his creditors interpose the statute of limitations against another, where the debtor acknowledges his indebtedness and refuses so to do.

And, as the indebtedness of Dr. A. S. Rockafield to the estate is much greater than his distributive share thereof, there can be no part of his said distributive share awarded or applied to the payment of the attachment, issued by the creditor of Dr. Rockafield.

So careful are courts in regard to the rights of attaching creditors that they have allowed the name of a new party to be added to the writ of attachment, where no rights of third parties have supervened. Sullivan v. Langley, 128 Mass. 235.

The judgment upon which this writ of attachment was issued

being an undisputed, valid judgment, and being between the debtor and attaching creditor alone, no rights of third parties having supervened, or being in any wise prejudiced or injured; taking our view from the facts as presented in the case, and from the standpoint fixed by the cases we have above referred to, we are of opinion, and our judgment is, that the share or portion of the money Dr. A. S. Rockafield is to receive out of the moneys to be paid under the agreement between the widow and heirs of Adam Rockafield, is subject to and bound by the attachment issued against him by Dr. Martin (now Dr. Martin's executor), to October term, 1885, No. 42; and that the amount due on the judgment upon which said writ issued, together with the costs of the revival of said judgment and the costs of attachment, must be paid out of said share of Dr. A. S. Rockafield.

Thus, share of Dr. Rockafield.....	$985 22
Deduct sum claimed under attachment.....	857 59
Leaving of said share the sum of	$127 63

to be paid by the administrator under said agreement to Dr. A. S. Rockafield.

Substituting the distribution we have thus made for the distribution made by the learned auditor, we dismiss the exceptions, and confirm the report absolutely.

(The court subsequently filed the following supplemental opinion to correct an error):

Now, April 28, 1886, the attention of the court having been called to an alleged error apparent on the face of the opinion and distribution filed, in the case by the court:

On inspection and examination, we find the general, or main features of the distribution to be correct. The share of each child, we found to be $3,684.73 2/7, and of each grandchild, $1,228.84; and up to this point the distribution is correct.

We inadvertently erred, however, in this: that after adding the indebtedness of Dr. A. S. Rockafield, to the sum for distribution, as if paid, $6,484.32, and then making distribution, we divided the share or dividend of Dr. A. S. Rockafield thus found, among the other children and grandchildren. This was a mistake, as his indebtedness was never paid.

That portion of our opinion as filed, with the distribution we made, commencing: "To each child's share, must be added one sixth of Dr. Rockafield's share, $614.12, and to each grand-

child's share one third of one sixth thereof, $204.70, making each child's full share $4,298.85, and each grandchild's share $1,432.94," is incorrect, and must be wholly stricken out, leaving each child's share $3,684.73 2/7, and each grandchild's share $1,228.84.

This will not affect the recapitulation in amount, or sum total, with the distribution thus corrected the *recapitulation will be:*

Widow's dower, or thirds	$12,896 56
Shares of the six children	22,108 39 5/7
Shares of three grandchildren	3,684 73 2/7
Credit for administrator on Dr. Rockafield's indebtedness	2,799 50
Fund for distribution	$41,489 19

The assignments of error specified the action of the court in not distributing the entire fund or balance in the administrator's account as the estate of Adam Rockafield; in finding that Dr. A. S. Rockafield had any interest in the estate of decedent; in finding that Dr. A. S. Rockafield had any interest, subject to attachment, in virtue of the agreement between the heirs and the widow, of second of October, 1885, in the sum of $6,896.56, or any other amount; in awarding to the estate of Dr. John Martin the sum of $857.59; in awarding to Dr. A. S. Rockafield the sum of $127.63; in substituting their own distribution for that of the auditor; and in allowing accountant $2,000 as commissions.

Wm. R. Wilson and *A. F. Hostetter,* for appellant.—The excess of Dr. Rockafield's share has not been collected, and the court allows the administrator credit for it. He is therefore not entitled to commissions on this amount. Bedell's Appeal, 85 Pa. 398.

Striking this out, the real debit is less than $40,000 and the commissions allowed a trifle more than 5 per cent.

This allowance, we claim, is greatly out of proportion to the amount earned.

This estate of $40,000 came into the administrator's hands exceptionally well invested in judgments, mortgages, and a few notes, and was much more easily administered than are most estates of its size. The heirs, immediately after it was inventoried, agreed, by correspondence with the administrator, to take

a large part of these securities in payment of their shares. Three fourths of the estate to-day is unconverted and standing in the securities which originally came into his hands and to be thus distributed in kind. With all this part of the estate the administrator has had no labor, except to collect and receive the annual interest on April 1. This the testimony shows was collected and received by his attorney, who has already been paid by the estate.

Considering the character of these securities, it will not be seriously contended that if the administrator had gone through the labor and responsibility of converting them and holding the cash he would be allowed more than 5 per cent. As it is, he did not have this labor and responsibility and cannot be paid for it. McCauseland's Appeal, 38 Pa. 470; Montgomery's Appeal, 86 Pa. 230; Stearly's Appeal, 38 Pa. 525; *Re* Harland, 5 Rawle, 323; Pusey v. Clemson, 9 Serg. & R. 209; Walker's Estate, 9 Serg. & R. 223; Davis's Appeal, 100 Pa. 201.

The effort of the attaching creditor to realize his judgment, which he holds against Dr. A. S. Rockafield, out of the estate of the decedent, cannot be sustained.

The auditor has found that the notes in question were, by the acknowledgments and admissions of Dr. Rockafield himself, as well as through his agent and counsel, both in court and out of court, subsisting indebtedness to his father's estate; and therefore a set-off to his share; and this finding (being affirmed by the court below) will not be disturbed, unless for manifest error. Roddy's Appeal, 99 Pa. 10.

And in this case all doubt should be put at rest, by the fact that Dr. Rockafield, by counsel, appeared before the auditor, and in court, and distinctly admits the indebtedness, and refuses to plead the statute of limitations. The attaching creditor must claim through Dr. Rockafield, or not at all. He can acquire no claim against the garnishee superior to what the debtor had. Riddle v. Etting, 32 Pa. 412; Strong v. Bass, 35 Pa. 333; Springle's Appeal, 29 Pa. 208; Myers v. Baltzell, 37 Pa. 491.

If, then, the attaching creditor stands in the same shoes as Dr. Rockafield, how can he recover? Kittera's Estate, 17 Pa. 422; Ritter's Appeal, 23 Pa. 96; Keen v. Kleckner, 42 Pa. 529.

The notes of Dr. A. S. Rockafield being a valid indebtedness due the estate, they will be set off against his distributive share, and must first be paid before he or the attaching creditor can take anything.

John A. Coyle, for A. J. Rockafield, appellee.—It is desired to add but a single citation of an authority to those contained in the opinion of the court.

In Whelen's Appeal, 70 Pa. 410, the entire estate passed into the hands of the executors in the shape of interest paying investments in stocks, etc. There was no change or conversion of assets; nothing required to be collected by suit. The actual duty performed was simply to pay to the legatees their respective portions of the securities (amounting in all to $163,000) after having held them a little over two months.

George Nauman, for Robert S. McClure, administrator, appellee.—Dr. A. S. Rockafield had given to his father three notes; one for $1,400, one for $1,100, and one for $2,000. The two latter notes were barred by the statute of limitations. At the audit the claim made by the other distributees, that these notes should be deducted from his share, was resisted by the attaching creditor; and that, on distribution, any creditor can avail himself of the statute against any claim which conflicts with his interest, is certainly settled in Ritter's Appeal, 23 Pa. 96; Kittera's Estate, 17 Pa. 422; and Milne's Appeal, 99 Pa. 483.

There is no such new promise in this case as will remove the bar of the statute. To take a case out of the operation of the statute, there must be an admission consistent with a promise to pay. Palmer v. Gillespie, 95 Pa. 340, 40 Am. Rep. 657; Montgomery v. Cunningham, 104 Pa. 349.

On the ground on which the court awarded the money to the attaching creditor, the argument is unanswerable.

October 6, 1885, the administrator of Dr. John Martin (having judgment against Dr. A. S. Rockafield) issued the attachment execution, and it was served on the same day. This attachment bound any money then in the hands of the garnishee, or which came into his hands subsequently. Sheetz v. Hobensack, 20 Pa. 412; Mahon v. Kunkle, 50 Pa. 216.

An attachment is a lien prior to a subsequent judgment. Straley's Appeal, 43 Pa. 89.

The administrator could have got judgment against Dr. Rockafield and attached all moneys in his own hands. Moyer v. Lobengeir, 4 Watts, 390, 28 Am. Dec. 723.

A garnishee has such rights, and such rights only, as exist at the service of the writ. Myers v. Baltzell, 37 Pa. 491.

OPINION BY MR. JUSTICE STERRETT:

The only specification of error in which there appears to be any merit is the seventh, in which the allowance of $2,000 commissions to the administrator is complained of as excessive.

In view of all the circumstances connected with the administration, we agree with the learned auditor that $1,600 is a liberal compensation for the services and responsibility of the administrator. That item is, therefore, reduced to that sum, and the difference, $400, added to the fund for distribution.

As to each of the questions involved in the remaining specifications, the opinion of the learned president of the orphans' court furnishes a satisfactory answer.

Decree reversed at the costs of appellee, and record remitted with instructions to distribute the fund in accordance with the foregoing opinion.

Silas M. Baily et al., Plffs. in Err., *v.* Commonwealth of Pennsylvania.

It is one of the trusts and duties required by law of the state treasurer to account for and pay over to his successor all moneys received by him in his official capacity; and his failure to do so is a breach of the condition of his bond—that he "shall truly and faithfully perform all the trusts and duties enjoined and required by law"—even though the failure be caused by the insolvency of the bank in which without fraud or knowledge of its condition he has deposited the money.

Statutory provisions for taking security from banks of deposit do not relieve the treasurer from his primary liability.

In actions by the commonwealth on the official bonds of public officers affidavits of defense may be required.

(Argued June 1, 1887. Decided October 3, 1887.)

May Term, 1887, No. 30, M. D., before GORDON, TRUNKEY, CLARK, GREEN, and STERRETT, JJ. Error to the Common Pleas of Dauphin County to review a judgment for the plaintiff for want of a sufficient affidavit of defense in an action of debt. Affirmed.

NOTE.—For a full discussion of the liability of the state treasurer, where money is lost by the insolvency of a bank of deposit, see State v. Gramm, 7 Wyo. 329, 40 L. R. A. 690, 52 Pac. 533; State v. Foster, 5 Wyo. 199, 29 L. R. A. 226, 38 Pac. 926, and the cases referred to in the notes to the latter report.

The facts are sufficiently stated in the following opinion, delivered in the court below by SIMONTON, P. J., upon making absolute the rule for judgment:

This is an action brought by the commonwealth of Pennsylvania against Silas M. Baily, late state treasurer, and his sureties, on his official bond. At the end of his term of office he was in default in a sum exceeding $70,000; and this action is brought to recover this sum.

In answer to the action an affidavit of defense is filed, by Mr. Baily, on behalf of himself and sureties, which in substance sets forth that he and they are not liable, because the commonwealth had provided no vault for a safe-keeping of the public funds, and because it is to be inferred from the act of 1874, P. L. 124, and of 1876, P. L. 3, that the treasurer is not liable for the loss of moneys deposited in the manner referred to in said acts.

The affidavit further sets forth that the practice of the state treasurer, for the time being has been to make such deposits; that the bank in which the deposits were made, in this instance, was in good credit, and that defendant made careful inquiry, as to its standing and management, before the deposits were made; that the deposits were made in the name of the commonwealth, and were payable, on demand, by the bank; that no reward, gain, or profit accrued or was to accrue to the treasurer; that the bank failed in 1884, and, by reason of its failure, and for no other cause whatever, the defendant was unable to account for and pay the said money to his successor. That he took from said bank bonds in the name of the commonwealth with solvent sureties in an amount greater than said deposits; that he has brought suit against said bank, and the sureties on the said bonds, which has not been determined.

It was contended, on behalf of the defendants, that this is not an action in which an affidavit of defense can be required, by law, from the defendant. A comparison of the provisions of the act of April 16, 1845, § 12, P. L. 535; act of 1846, § 4, P. L. 413; act of April 21, 1857, § 3, P. L. 266; and act of April 7, 1862, § 1, P. L. 304,—shows clearly that an affidavit of defense is required to be filed in all actions brought by the commonwealth for the recovery of money; and a reference to these acts is all that is necessary on this point.

The only real question in the case is whether the treasurer and his sureties are liable upon his official bond for moneys de-

posited by him, as stated in the affidavit, and lost without fault or negligence on his part. There is much conflict of decisions on this question, many courts holding that public officers sustain the relation, merely, of bailees with respect to public moneys in their hands and are therefore not liable to account therefor, when it has been lost without negligence or fault on their part. This, however, is not the law in this state.

In Com. v. Comly, 3 Pa. St. 372, which was an action of debt on the bond of a collector of tolls, the defense was that the moneys had been stolen from the desk of the collector in the nighttime, and this was held by the court to be no defense to the action on the bond. GIBSON, Ch. J., delivering the opinion of the court, said: "The responsibility of a public receiver is determined, not by the law of bailment, which is called in to supply the place of a special agreement where there is none, but by the condition of his bond. The condition of it in this instance was, to 'account for and pay' over the moneys to be received; and we would look in vain for a power to relieve him from the performance of it."

The condition of the bond in this case is "that if the above-bounden Silas M. Baily, state treasurer of the said commonwealth of Pennsylvania, shall truly and faithfully perform all the trusts and duties enjoined and required by law to be done and performed by such state treasurer, then this obligation to be void or else to be and remain in full force and virtue." It cannot be doubted that one of the trusts and duties required by law—whether by statute or at common law—of the state treasurer is to account for and pay over to his successor all moneys received by him in his official capacity. His failure to do so was therefore a breach of the condition of the bond.

As was said by Mr. Justice STRONG, in Boyden v. United States, 13 Wall. 23, 20 L. ed. 529: "It is a settled rule that if the performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, although unforeseen by the contracting party, and not within his control, he will not be excused."

And for reasons of public policy, as is further said in the same case, "the rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even

though the money may have been lost without fault on their part." In the case from which these quotations are made the receiver was held liable, although his failure to pay over the moneys was caused by the fact that he was "suddenly beset in his office, thrown down, bound, gagged, and that against all the defense he could make the money was violently and without his fault taken from him."

This case followed and affirmed United States v. Prescott, 3 How. 587, 11 L. ed. 738, which is also quoted and approved by GIBSON, Ch. J., in Com. v. Comly, above referred to, where it was held to be no defense, even on behalf of the surety, that the money was stolen from the principal without any fault or negligence on his part, and we have not been referred to, nor can we find, any later case in this state modifying this doctrine.

The question is, therefore, not an open one for a court of the first instance in this state, even were it not supported by a mass of authorities elsewhere, a few of which are here referred to: United States v. Morgan, 11 How. 161, 13 L. ed. 646; United States v. Dashiel, 4 Wall. 182, 18 L. ed. 319; United States v. Keehler, 9 Wall. 83, 19 L. ed. 574; Bevans v. United States, 13 Wall. 56, 20 L. ed. 531; United States v. Thomas, 15 Wall. 337, 21 L. ed. 89; State use of Wyandot County v. Harper, 6 Ohio St. 607, 67 Am. Dec. 363; New Providence v. McEachron, 33 N. J. L. 339; Taylor v. Morton, 37 Iowa, 550; Union v. Smith, 39 Iowa, 9, 18 Am. Rep. 39; Halbert v. State, 22 Ind. 125; Morbeck v. State, 28 Ind. 86; Rock v. Stinger, 36 Ind. 346; Steinback v. State, 38 Ind. 483; Perley v. Muskegon County, 32 Mich. 132, 20 Am. Rep. 637.

It is contended, however, on behalf of defendants, that the provisions of the acts of 1874 and 1876, referred to in the affidavit of defense, imply that where the money is deposited by the treasurer in banks in good standing and security is taken in the name of the commonwealth therefor, the liability of the treasurer to account absolutely for the sums so deposited ceases. We do not think these acts were intended, or can properly be construed, to have this effect. They were intended simply to add to the security of the state by furnishing to the auditor general such information as would enable him, if necessary, to act as a check upon carelessness or neglect of the treasurer.

As the law has been declared, there remains for us no other

course than to direct judgment to be entered in favor of the commonwealth against the treasurer and his sureties for the penalty of the bond, with leave to issue execution for the amount appearing to be due from the copy of the account filed with the declaration; said amount to be liquidated by the prothonotary.

The assignment of error specified the action of the court in directing the judgment to be entered against the treasurer and his sureties for want of a sufficient affidavit of defense.

Weiss & Gilbert and *W. F. McCook,* for plaintiffs in error.—The bond to be given by the state treasurer is provided for by the first section of the act of May 9, 1874, P. L. 126, as follows:

"He shall become bound to the commonwealth in an obligation, with ten or more sufficient sureties, to be approved by the governor, in the sum of $500,000, conditioned for the true and faithful performance of the trusts and duties of his office."

The condition of the bond in suit is not copied from this act, but from § 40 of the act of March 30, 1811 (5 Smith, Laws, 237), which was supplied by the act of 1874.

Section 8 of the same act of 1874, P. L. 127, is as follows:

"Section 8. The state treasurer, on the first business day of each month, shall render a statement of account to the auditor general, giving in detail the different sums which go to make up the grand total of the amount on that day in the state treasury, exclusive of moneys appropriated to the sinking fund. Such statement shall include the names of banks, corporations, firms, or individuals with whom the public funds are deposited, with the various amounts of such deposits, the securities held by the state for the safe-keeping of the same, and the rate of interest received by the state on such deposits, and shall be verified by the oath or affirmation of the state treasurer, and recorded in a book kept for that purpose in the auditor general's office, and shall be open for the inspection of the governor, heads of departments, members of the legislature, or any citizen of the state desiring to inspect the same, and shall be correctly published in two newspapers at Harrisburg for general information."

Section 2 of the act of February 12, 1876 (supplementary to the act of 1874, before cited), is substantially the same as §

8 of the act of 1874, except that it relates to the sinking fund, and contains this additional provision:

"And each bank, corporation, firm, or individual with whom such moneys are deposited shall render on the first business day of each month an account to the auditor general corresponding to that of the state treasurer, giving the amount of such moneys deposited during the month, the amount then on deposit, the rate of interest, if any, paid on such deposit, and the securities held by the state for the safe-keeping of such moneys."

These sections are identical with § 10 of the act of April 13, 1870 (P. L. 67), which applies to both the general fund and the sinking fund, and contained the provision last above quoted from the act of 1876, which was omitted from the act of 1874.

The general character of the office of state treasurer and duties of that office as to the receipt and care of public money, are nowhere described by the Constitution or by any act of assembly. It is an office created by the Constitution, and from time to time certain duties have been imposed upon the person filling it. Certain moneys are required to be paid to him; and provisions are made for payment by him; but it is nowhere expressly made his absolute duty to pay over to his successor the moneys remaining in the treasury or on the books of the treasury at the expiration of his term.

In Com. v. Comly, 3 Pa. St. 372, and indeed in nearly every case referred to by the court, the condition of the bonds sued on was that the officer should account for and pay over all moneys he may receive, etc.

How can an officer who has done with the money in his charge just what the law says he may do with it, and who has done nothing forbidden by law, be held responsible for a loss which has resulted, without any fault or negligence of his own?

John F. Sanderson, Deputy Atty. Gen., and *W. S. Kirkpatrick,* Atty. Gen., for the commonwealth, defendant in error.—When the state treasurer receives the money of the state into his possession he becomes a debtor of the state. He remains such debtor until he is discharged from his liability by payment, according to law, of the money received by him. Any sum remaining to his debit after payment of warrants, drawn by lawful authority, is payable to his successor in office or to any person lawfully demanding it at the instance of the state. The

condition of the bond, therefore, which requires that he shall truly and faithfully perform all the trusts and duties enjoined and required by law to be done and performed, clearly covers the duty in question, which is clear at common law, and which needs no declaratory statute for its definition.

The responsibility of a public receiver is determined not by the law of bailment, which is called in to supply the case of a special agreement, where there is one, but by the condition of his bond. Com. v. Comly, 3 Pa. St. 372.

The felonious taking and carrying away of public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defense to an action on his official bond. United States v. Prescott, 3 How. 578, 11 L. ed. 734.

The obligation to keep safely the public money is absolute, without any condition expressed or implied; and nothing but the payment of it when required can discharge the bond. Public policy requires that every depositary of the public money should be held to a strict accountability; not only that he should exercise the highest degree of vigilance, but that he should keep safely the moneys which come to his hands. Any relaxation of this condition would open a door to fraud which might be practised with impunity. Ibid.

There is an established difference between a duty created merely by law and one to which is added the obligation of an express undertaking. The law does not compel impossibilities; but it is a settled rule that if performance of an express engagement becomes impossible by reason of anything occurring after the contract was made, although unforeseen by the contracting party, and not within his control, he will not be excused. The rule has been applied rigidly to bonds of public officers intrusted with the care of public money. Such bonds have almost invariably been construed as binding the obligors to pay the money in their hands when required by law, even though the money may have been lost without fault on their part. Boyden v. United States, 13 Wall. 17, 20 L. ed. 527.

A police officer who receives public money is a debtor, an accountant bound to account for and pay over the money he has collected. The loss of his money, therefore, by theft or otherwise, is no excuse for nonperformance. This is founded on

the nature of his contract and considerations of public policy. Hancock v. Hazzard, 12 Cush. 112, 59 Am. Dec. 171. See Thompson v. Township Sixteen, 30 Ill. 99; New Providence v. McEachron, 33 N. J. L. 339; Hennepin County v. Jones, 18 Minn. 199, Gil. 182; Redwood County v. Tower, 28 Minn. 45, 8 N. W. 907.

Where a clerk of a court is bound to account for and pay over all money received by virtue of his office, he is liable as an insurer at all events, or debtor, in respect to such money, and can only be relieved by payment. Whether the clerk deposited the money in bank to his own credit, or to his credit as clerk, makes no substantial difference. Havens v. Lathene, 75 N. C. 505. See also Lowry v. Polk County, 51 Iowa, 50, 33 Am. Rep. 114, 49 N. W. 1049; Ross v. Hatch, 5 Iowa, 149; State *ex rel.* Mississippi County v. Moore, 74 Mo. 413, 41 Am. Rep. 322; Taylor v. Morton, 37 Iowa, 550; State *ex rel.* Bladen County v. Clarke, 73 N. C. 255; Clay County v. Simonsen, 1 Dak. 403, 46 N. W. 592; Inglis v. State, 61 Ind. 212; United States v. Watts, 1 N. M. 553; Hart v. Pittsburgh, 81* Pa. 466; Union v. Smith, 39 Iowa, 9, 18 Am. Rep. 39; Perley v. County of Muskegon, 32 Mich. 132, 20 Am. Rep. 637; Swartwout v. Mechanics' Bank, 5 Denio, 555; Commercial Bank v. Hughes, 17 Wend. 100; State *ex rel.* The Twp. v. Powell, 67 Mo. 395, 29 Am. Rep. 512. See also Ward v. School Dist. No. 15, 10 Neb. 293, 35 Am. Rep. 477, 4 N. W. 1001; Jefferson County v. Lineberger, 3 Mont. 231, 35 Am. Rep. 462; Wheeler v. Hambright, 9 Serg. & R. 390.

Weiss & Gilbert and *W. F. McCook*, in reply.—Had the bond of General Baily, or the acts of assembly relating to the office of state treasurer prescribed that he shall truly and faithfully perform the duties of his office, and pay over all moneys received by him, then United States v. Prescott, 3 How. 587, 11 L. ed. 738, and Com. v. Comly, 3 Pa. St. 372, would be decisive. But in this case it is otherwise. This distinction is clearly drawn in United States v. Thomas, 15 Wall. 337, 21 L. ed. 89, in which it is held that a collector or receiver of public funds is a bailee at common law, and only liable for negligence or dishonesty, unless a measure of enhanced accountability can be found in his official bond or the policy of the acts of Congress on the subject.

OPINION BY MR. JUSTICE STERRETT:

It appears to be a harsh measure of justice to hold that the treasurer and his sureties are liable on his official bond for the money deposited under the circumstances disclosed in the affidavit of defense, and subsequently lost without his fault or negligence; but it is impossible to reach any other conclusion without ignoring the authority of well-considered cases cited and relied on by the learned president of the common pleas.

The only question presented by the record is so fully considered by him in his opinion that further elaboration is unnecessary. In view of the authorities referred to, and for the reasons there given, we are constrained to say that there is no error in the judgment.

Judgment affirmed.

James Hoop, Plff. in Err., *v.* A. Anderson.

A road commissioner who permits his claim for services to be credited by the county auditors to another commissioner, to balance the latter's account, upon his express promise of repayment, may maintain assumpsit against him for the amount so credited with interest from the date of the audit.

(Argued May 9, 1887. Decided October 3, 1887.)

January Term, 1887, No. 377, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, STERRETT, GREEN, and CLARK, JJ. Error to the Common Pleas of McKean County to review a judgment on a verdict for the plaintiff in an action of assumpsit. Affirmed.

This was an action of assumpsit on the money counts by A. Anderson against James Hoop, to recover money alleged to have been advanced by Anderson to Hoop.

At the trial before OLMSTED, P. J., the following facts appeared:

Anderson, Hoop, and Thomas L. Kane were state road commissioners under an act of December 18, 1873, to lay out a road from Kane to Lafayette in McKean county, and as such were to collect taxes and receive commissions and allowances for expenses. Anderson thus became entitled to receive $365.11 from the state.

The day before their accounts were to be audited and settled by the county auditors (so Anderson testified) Hoop said he had more than enough state road money at home to pay not only Anderson's claim but his own claims for services, etc., but that he did not have enough money with him to settle his accounts unless Anderson would look to him for payment after they got home, and in the settlement permit his (Anderson's) claim for $365.11 to be credited to Hoop as paid. Anderson assented and the accounts were settled accordingly. This action was brought to recover the amount so advanced by Anderson to Hoop, and interest. Hoop denied the admission and promise, and testified that he had only about $200 of the state road money in his hands at the time.

The court below admitted in evidence a copy of the county auditors' report, for the purpose of showing that Hoop had received credit for the amount claimed, refused the defendant's points, to the effect that such a contract would be against public policy and a contract to pay another's debt, and charged the jury that if they believed, according to the testimony of Anderson, that such an express promise was made by Hoop they should find for the plaintiff; otherwise, for the defendant.

These rulings were the subjects of the assignments of error. Verdict and judgment were for the plaintiff, for $456.83.

B. D. Hamlin and *Sterrett & Rose,* for plaintiff in error.—The contract claimed under is against public policy. The two state road commissioners who are the parties to the contract are the parties to this suit and were, with another commissioner who was not privy to it, trustees of a public fund raised by them from taxation. Three commissioners, instead of a less number, were constituted and paid for the transaction of the business, in order to have the benefit of their combined judgment, and that each might act as a check upon the conduct and accounts of the others. They should not be permitted to agree among themselves on a claim one of them might make on the fund, and he assign such agreed-upon claim to another of the commissioners, and they together put it through the auditing board and receive the benefit of it.

An agreement in consideration of relinquishing the right to the administration of an estate is against public policy, and will

not be enforced. Bowers v. Bowers, 26 Pa. 74, 67 Am. Dec. 398.

A contract by an administrator to sell the real estate of his intestate for a fixed sum and on certain terms of payment, and that he will make the title through the medium of the orphans' court, is void and will not be enforced. Myers v. Hodges, 2 Watts, 381, 27 Am. Dec. 319.

It is not necessary to show that any fraud was actually perpetrated, or contemplated—the policy of the law being to confine trustees to such a course of conduct as will avoid the opportunity or inducement.

In matters touching the agency, agents cannot act so as to bind their principals where they have an adverse interest in themselves. Story, Agency, § 210.

Agents are not permitted to deal validly with their principals in any cases, except where there is the most entire faith, and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition. 1 Story, Eq. Jur. §§ 315, 316.

The principle applies in a case where a board is authorized to act in a fiduciary capacity and attempts to deal in that capacity with one of its members. Cumberland Coal & I. Co. v. Sherman, 30 Barb. 553; Whichcote v. Lawrence, 3 Ves. Jr. 740; Pickett v. School Dist. No. 1, 25 Wis. 551, 3 Am. Rep. 105; Wormley v. Wormley, 8 Wheat. 421, 5 L. ed. 651.

Some evidence was permitted on the trial below tending to show that defendant made some new promise or recognition of the former promise, after the settlement was concluded with the auditors. This, if true, will not be enforced, because of the illegal consideration on which it was originally founded, the taint following it. Chamberlain v. M'Clurg, 8 Watts & S. 31; Negley v. Lindsay, 67 Pa. 217, 5 Am. Rep. 427.

The plaintiff's claim was settled and extinguished by the county auditors.

The plaintiff and his two associate trustees submitted the accounts to a settlement by the county auditors; it was not appealed from, and their decision is final. Siggins v. Com. 85 Pa. 278.

The auditors' report cannot be reviewed by them or their successors, or enlarged by an agreement. Northampton County v. Yohe, 24 Pa. 305.

It cannot be opened for the correction of errors. Northumberland County v. Bloom, 3 Watts & S. 542.

The claim of a supervisor against a township, for services rendered or money expended, should be presented to the auditors for allowance. A common-law action will not lie for its recovery. Brown v. White Deer Twp. 27 Pa. 109.

The decision of the auditors is conclusive and cannot be inquired into, either by the same tribunal at another time or by a court of law, except upon appeal. Blackmore v. Allegheny County, 51 Pa. 160.

It concludes a county for taxes collected by the county treasurer for a township, and renders the county liable. Potter County v. Oswayo Twp. 47 Pa. 162.

The state road commissioners chose to intermingle and combine their accounts with the fund, and to settle them jointly, and having stated the account jointly, it is conclusive against them. Carbondale v. Bonner, 1 Luzerne Legal Obs. 203.

Assumpsit cannot be maintained under the facts in this case.

One partner cannot maintain assumpsit against another, for the proceeds and settlement of a partnership adventure, unless they have settled their accounts and struck a balance. Ozeas v. Johnson, 1 Binn. 191; Andrews v. Allen, 9 Serg. & R. 241; Killam v. Preston, 4 Watts & S. 16.

Hoop received no consideration for the promise he made to Anderson. Where a legal obligation exists, a cumulative promise to perform it, unless upon a new consideration, is a nullity. Such promise adds nothing to and takes nothing from the original obligation. A promise cannot be conditioned upon a promise to do a thing to which a party is already legally bound. Wimer v. Worth Twp. 104 Pa. 320; 1 Wharton, Contr. §§ 498, 500; Robb v. Mann, 11 Pa. 300, 51 Am. Dec. 551.

W. B. Chapman and *T. A. Morrison,* for defendant in error. —If the defendant had the money in his hands, and promised to pay it to the plaintiff when they returned home from the auditors' settlement, his promise did not come within the statute of frauds. Townsend v. Long, 77 Pa. 143, 18 Am. Rep. 438; Justice v. Tallman, 86 Pa. 147.

If the defendant did not in fact have the money, but represented to the plaintiff that he did, and thereby induced the plaintiff to settle with the auditors as if he had been paid, the defend-

ant is estopped by his own declaration from denying in this suit that he had the money. Dock v. Boyd, 93 Pa. 92.

A moral obligation is sufficient to support an assumption to pay a debt barred by a report of county auditors which was properly filed, and had become a judgment, and from which no appeal was taken. Stebbins v. Crawford County, 92 Pa. 289, 37 Am. Rep. 687, and cases cited.

OPINION BY MR. CHIEF JUSTICE GORDON:

There is not a legal proposition in this case that is worth a moment's consideration. The whole matter was for the jury, and so far as the court was concerned the case was properly submitted.

Anderson, the plaintiff below, swore to enough to make out his case. According to his statement, Hoop had money sufficient and more than sufficient to pay the claim in controversy; but, alleging that he had not the amount with him, he proposed that the plaintiff should submit his claim to the auditors and allow it to be credited to the commission, and when they got home he should be paid. Anderson did so submit his claim; it was credited accordingly, and, of course, as Hoop was the person who was accountable for the money, he thus obtained a credit through Anderson of some $365, which otherwise would have appeared in the auditors' account as a debit against him. It was, in fact, the equivalent of so much money loaned to apply on the account against him.

With a transaction as simple as this public policy has nothing to do. "If," says Hoop, "your account is found by the accounting officers to be correct, turn it over to me that I may use it as a credit, and I will be your debtor to that amount." How is it possible that public policy can be involved in a matter such as this? And why should not the defendant pay as he contracted to do? He must needs pay at all events, if not as for a debt of his own, yet as for one that otherwise would have been audited against him. So, the idea that he undertook to pay, not his own debt, but that of some other person, is preposterous; for if he made the assumption at all, he assumed to pay just what Anderson had advanced for his benefit, and which, even as collector, he justly owed Anderson. It is true that Hoop swore to a very different state of facts than those detailed by Ander-

son; but as the jury did not believe him he has that body to blame for his mishap, rather than the court.

The judgment is affirmed.

Caroline Snyder and Her Husband, William Snyder, for the Use of said Caroline Snyder, Plffs. in Err., *v.* City of Lancaster.

A house which, by the destruction of an adjoining house in opening a city street, is deprived of its gable end, is, although not touched by the street itself, "injured" within the meaning of article 16, § 8, of the Constitution of 1874, and its owner is entitled to compensation from the city.

(Argued May 16, 1887. Decided October 3, 1887.)

July Term, 1886, No. 91, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, GREEN, and CLARK, JJ. Error to the Common Pleas of Lancaster County to review a judgment on a verdict for the defendant in an appeal by the plaintiffs from a report of viewers. Reversed.

This was an appeal from the report of viewers and an issue thereon to ascertain the amount of damages, if any, sustained by Caroline Snyder by reason of the laying out and opening of Filbert street, Lancaster city.

By an act of assembly, special to Lancaster city, passed in 1854, P. L. 352, it is provided "that if any house, out-house, stable, or other building be removed or injured by the opening or extension of any street or alley as aforesaid, the said jury shall estimate the value of such building or the injury done thereto, and present a statement thereof in their report, which amount, after confirmation by the court, shall be paid out of the city treasury."

And by another act of assembly, special to the city, passed in 1873, P. L. 811, providing for a new city plan, it is provided that "street damages shall be paid by the said city of Lancaster, and the county of Lancaster, in the manner and in the proportions directed by existing laws;" *i. e.*, the county to pay for the land and the city to pay for the buildings removed or injured.

Plaintiff in error was the owner of a house and lot of land

fronting 16 feet 2 inches on the west side of St. Joseph street, Lancaster city. St. Joseph street runs north and south. The city of Lancaster laid out a street called Filbert street, running west from St. Joseph street. Adjoining the Snyder property on the north, and fronting on the west side of St. Joseph street 21 feet 3 inches, was the property of Ambrose Worth. There was a house built on the front of each of the lots, each house occupying the full front of the lot. Filbert street took all the Worth house except 3 feet on St. Joseph street, and about half way back the lots, Filbert street cut into the Snyder lot and at the rear of the two lots took all of the Worth lot and 3 feet of the Snyder lot. At the time the houses were built the same man owned both lots and built both houses. The Snyder house was built into the wall of the Worth house, the timbers resting on said wall; and it had no other gable end.

The plaintiff proved by Philip Stumpf: "This house is injured by the opening of Filbert street. . . . The house will have no gable end after the corner house is torn down. The corner house will be taken away by the street. . . . The girders of the Snyder house are joined in the corner house."

Christian Ferrich testified: "The Snyder property is injured; the gable end must come down. . . . It injures her property by reason of taking Mr. Worth's property."

This appeal was first entered from the assessment of damages by the jury against the city for injury to the Snyder house, and against the county for land taken from the north side of the rear of the Snyder lot. But the appeal as to the county was withdrawn, and the award of viewers against the county for the land taken was accepted.

The court below, LIVINGSTON, P. J., charged the jury, *inter alia,* that as Filbert street "does not come within 3 feet of her house, does not touch it anywhere; and there will be a portion of the house of Worth adjoining hers, and about 3 feet of his land between her building and Filbert street [she will not receive any injury, or sustain any damage by the opening of Filbert street, which the city of Lancaster is liable to pay. It is only liable to pay for buildings taken or injured by the opening of streets in said city. Her house not being taken or injured by the opening of this street, your verdict should be for the defendant.]"

Verdict and judgment were for defendant.

The assignment of error specified the portion of the charge inclosed in brackets.

Philip D. Baker and *G. C. Kennedy,* for plaintiffs in error.—Damages can be recovered for injury to a house, where the house is not actually taken but part of the lot on which it stands is taken, and the necessary support given by an adjoining house is taken by a street, whereby the end of the house must fall down.

The Constitution of 1874, art. 16, § 8, provides that "municipal and other corporations and individuals invested with the privilege of taking private property for public use shall make just compensation for property taken, injured, or destroyed by the construction or enlargement of their works, highways, or improvements."

Corporations in which the legislature has vested the right of eminent domain are by this section made liable for damages resulting to private property from the construction, use, or alteration of their works, ways, or other improvements; in other words, to such damages as are ordinarily called consequential. Pusey v. Allegheny, 98 Pa. 526; Reading v. Althouse, 93 Pa. 406.

If the plaintiff's house, instead of being supported by Worth's house, were (under similar circumstances as to ownership at the time of building) supported by props resting upon the Worth property, and the city had by the opening of its streets removed these props and thrown down the wall, the city would have been responsible. It will be remembered also that by the opening of this street the property of the plaintiff, on which this house stands, is entered upon and part of it taken. The plaintiff's house, it is true, is not removed but it is "injured," which brings this case within the act of 1854, and also "injured" so as to bring it within the provisions of the Constitution of 1874.

H. Carpenter, for defendant in error.—The line of Filbert street does not touch the house for which the plaintiff claims damage.

It is incumbent on Ambrose Worth to protect Caroline Snyder's house in the event of the removal of his house, that might be an element of consequential damage to him under the decisions in Pusey v. Allegheny, 98 Pa. 526, and Reading v. Alt-

house, 93 Pa. 406. But in this case the cause is too remote to bring it under those decisions.

OPINION BY MR. JUSTICE GREEN:

As we understand the facts of this case the Worth house must be taken down, in order to open Filbert street. It is testified that the plaintiff's house will have no gable end when the Worth house is taken down. If such is the case, the plaintiff's house will certainly be injured by the removal of the Worth house; and as this removal is a necessary part of the opening of Filbert street, we cannot avoid the conclusion that the opening of the street is, or will be, the direct cause of the injury to the plaintiff's house. This being so, the case comes within the operation of § 8, art. 16, Const. 1874, and should have been submitted to the jury, with proper instructions.

Judgment reversed and new *venire* awarded.

Henry Leister's Appeal.

James C. Swoope's Appeal.

E. F. Gould's Appeal.

James O'Neill's Appeal.

If the record is without fault the supreme court will not review on appeal and certiorari the action of the court of quarter sessions in refusing, under the act of March 22, 1867, a license for the sale of intoxicating liquors.

By supplemental opinion a judge of the court below may, even after

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Cited in Sperring's License, 7 Pa. Super. Ct. 131, 134, 42 W. N. C. 37, and in Kahrer's License, 12 Pa. Co. Ct. 12, 15, 1 Pa. Dist. R. 547.

NOTE.—See note to Conway's Petition, 1 Sad. Rep. 43.

The "act to restrain and regulate the sale of vinous and spirituous, malt, or brewed liquors or any admixture thereof," approved May 13, 1887; and that "providing for the licensing of wholesale dealers in intoxicating liquors," approved May 24, 1887, extend throughout the state of Pennsylva-

an appeal is entered, state the facts on which his decision was based, and correct his reasons.

It seems that the applicant's former wilful violation of the liquor laws, coupled with a great preponderance of special remonstrance against granting him a license, constitute sufficient reason for refusing a license.

It seems also that a judge is not justified in refusing a license, merely because he does not think it necessary to license a hotel to sell intoxicating liquors.

(Argued May 25, 1887. Decided October 3, 1887.)

July Term, 1887, Nos. 32, 33, 34 and 35, E. D., before GORDON, Ch. J., TRUNKEY, CLARK, and STERRETT, JJ. Certioraris sur appeals from decrees of the Quarter Sessions of Huntingdon County refusing tavern licenses. Affirmed.

The several petitions of Henry Leister, James C. Swoope, E. F. Gould, and James O'Neill for licenses to keep, during the ensuing license year, inns or taverns in the county of Huntingdon, were filed between the 14th and 18th of March, 1887, set-

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nia a uniform scale of license fees, graduated in accordance with the classification of municipalities. See Monaghan, Anno. Liquor License Laws of 1887; Com. *ex rel.* Stein v. McCandless, 4 Pa. Co. Ct. 119

Section 7, of the act of May 13, 1887, is as follows:

"The said court of quarter sessions shall hear petitions from residents of the ward, borough or township, in addition to that of the applicant, in favor of and remonstrance against the application for such license, and in all cases shall refuse the same whenever, in the opinion of the said court, having due regard to the number and character of the petitioners for and against such application, such license is not necessary for the accommodation of the public and entertainment of strangers or travelers, or that the applicant or applicants is or are not fit persons to whom such license should be granted; and upon sufficient cause being shown or proof being made to the said court that the party holding a license has violated any law of this commonwealth relating to the sale of liquors, the court of quarter sessions shall, upon notice being given to the person so licensed, revoke the said license."

Under this literal re-enactment of that portion of § 1, of the act of March 22, 1867, which defined the duty of the court to grant or refuse a license, the method for ascertaining whether a license is "necessary for the accommodation of the public and entertainment of strangers or travelers," and the duty to refuse it if it is not necessary for those purposes, remain unchanged; and the authorities for the interpretation of the act of 1867 apply with equal force to the act of 1887.

The principal cases on this point prior to the decision of Reed's Appeal were reviewed in the note to that case, 4 Cent. Rep. 909.

In subsequent cases some of the courts of quarter sessions have held that

ting forth that the petitioners were citizens of the United States, and that their respective houses, *viz.*, the "Leister House" and "Hotel Brunswick" in the borough of Huntingdon, the "Exchange Hotel" in the borough of Dudley and the "Mountain House" in Broad Top City, were well provided for the accommodation of the public and the entertainment of strangers and travelers, having respectively for the exclusive use of travelers four bed rooms and eight beds, fifteen bed rooms and beds, eight bed rooms and ten beds, and two bed rooms and four beds. The certificates to the first two petitions were signed by fourteen persons each, and the last two were signed by twelve persons each, and set forth that the petitioners were persons of good repute for honesty and temperance, and citizens of the United States, that such inn or tavern was necessary to accommodate the public and entertain strangers and travelers, and that the accommodations of each house were as described in the respective petition for it. Each petition was accompanied by a bond for $2,000, conditioned for compliance with the act of April 12, 1875.

The court below considered the applications April 11, 1887, and on April 14, the following opinion, written by FURST, P. J., was filed in each case by MCCARTHY and FOREMAN, A.JJ.:

The fact that the house is necessary for the accommodation

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in view of Reed's Appeal the necessity for a license is to be determined solely by the number and character of the petitioners for and against each application (Lycoming County Licenses, 3 Pa. Co. Ct. 90; Wayne County Licenses, 3 Pa. Co. Ct. 301); without regard to the aggregate number of licenses granted in the county (*Re* License Application, 2 Pa. Co. Ct. 603); although the contrary was held in Northumberland County Licenses, 2 Pa. Co. Ct. 660; and that where petition and remonstrance are of equal weight the license must be granted (Kistler's License, 2 Pa. Co. Ct. 60); and can be refused only when, other objections failing, the remonstrants largely outnumber the petitioners (Mercer County Licenses, 3 Pa. Co. Ct. 43).

But in other cases it has been held that the petition and remonstrance are not conclusive, but merely persuasive (*Re* Conroy, 3 Pa. Co. Ct. 52; Morris's License, 3 Pa. Co. Ct. 307); and that in the absence of absolute necessity the prevailing sentiment of the community against granting the license should insure its refusal (Chester County Licenses, 3 Pa. Co. Ct. 304).

In two cases it has been held that if the necessity for a hotel is established, the necessity for the license inseparably follows (Beaver County Licenses, 3 Pa. Co. Ct. 56; *Re* Frey, 3 Pa. Co. Ct. 93); and this view seems to be confirmed by the opinion of the supreme court in the case here reported.

of the traveling community and the entertainment of strangers is established. It is the leading hotel in the borough and largely patronized by the public. It has all the accommodations required. The applicant has complied with the requirements of the law. While such is the case, we, the associate judges, do not think that it is necessary to license a hotel to sell intoxicating liquors, and we therefore refuse this application.

In the applications of Leister and Swoope, FURST, P. J., filed the following dissenting opinion:

These applications for license under the law and the evidence in the case clearly should be granted.

The Leister House and the Hotel Brunswick are the principal hotels in the borough of Huntingdon. They are large and commodious and have all the conveniences required by the act of assembly. Both are largely patronized by the traveling public, and, without them, strangers and travelers visiting this town could not be entertained. If these hotels were to close, many persons having business at this place would be compelled to beg for lodging at private dwellings, or be compelled to leave town. It is an undisputable fact that these hotels are an absolute necessity in this place. They are well kept and constantly full of strangers and travelers. The applicants themselves come within all the conditions and requirements of the law. All the provisions of the law relating to the granting of licenses have been complied with in both cases. The petitions for license have been supported by a large number of other petitioners stating the necessity of these hotels for the accommodation of the public.

Remonstrances have been filed, each signed by a large number of most worthy and respectable citizens, male and female, residing in this town. The remonstrants are the best or among the best citizens of the community. They are persons in whose judgment and sincerity and rectitude I have the highest regard and confidence. I have weighed carefully the objections they present to the granting of these applications.

In their remonstrances they will not state that these hotels are not necessary for the accommodation of the public and strangers; they, however, represent that license to sell liquor is not necessary. These remonstrances, therefore, though filed against each applicant by name, are general in their nature and they

remonstrate against the law rather than against the hotel. They do not recognize the fact that the legislature has determined that license shall exist. They ask the court to sit in judgment upon the propriety of the law, and not to administer the law as written in the statute and declared in the decisions of the supreme court.

As a private citizen I have as fixed and positive convictions upon this subject as anyone remonstrating before the court. My sentiments touching the propriety of the license laws of this state and my objections to them have been often publicly expressed. While at the bar I refused to present applications for license. I could then act as prompted by my own individual sentiment, but when I assumed the position of president judge of the forty-ninth judicial district I took upon myself an oath of office that I would obey, defend, and administer the laws of this commonwealth. This obligation requires me to administer every law upon the statute book whether it is obnoxious to me or not. The only guide I can have is the written statute and the rulings thereunder by the supreme court. Loyalty to each requires of me implicit obedience. This is the only safe rule by which, and under which, the law can be administered and the rights of all persons under the law vindicated and protected. There is here no room for private sentiment, or antagonism to the constituted authorities of the law.

If we desire a change in the law our duty is to apply to the legislature. We cannot ask the court of inferior jurisdiction either to set aside an act of assembly, or reverse the decision of the higher court, both of which have been done in this case by my brethren on the bench, who are unlearned in the law.

If we desire the fundamental law of the state changed we obtain this by the vote of the people under a constitutional amendment submitted to them for their approval or rejection. We cannot have this done except in the method pointed out by the law.

Under a license system it is impossible to have prohibition. Whether license should be granted is a legislative not a judicial question. Courts sit to administer the law fairly as it is given to them, and not to make or repeal it. The law of the land has determined that license shall exist, and has imposed upon the court the duty of ascertaining the proper instances in which

the license shall be granted, and therefore has given it to the court to decide upon each case as it arises in due course of law.

The act of deciding is judicial, and not arbitrary or wilful. The discretion vested in the court is therefore a sound judicial discretion, and to be a rightful judgment it must be exercised in the particular case and upon the facts and circumstances before the court, after they have been duly considered; in other words to be exercised upon the merits of each case according to the rule given by the act of assembly. This is the language of the supreme court as delivered by Mr. Justice AGNEW, the apostle of prohibition, in Schlaudecker v. Marshall, 72 Pa. 200.

This doctrine is also affirmed in the recent case of Reed's Appeal, 114 Pa. 452, 6 Atl. 910. It has never been departed from in any reported case of the supreme court. It has been universally received by the profession and by the courts of quarter sessions throughout the state as the settled law of the land.

My brethren have seen fit to depart from it. They hold, notwithstanding this clear enunciation of the law by Judge AGNEW, whose decisions are held in the highest esteem by the bench and the bar, that they have the right to pass upon the propriety of the law and that "in their opinion no license is necessary."

This is not only apparent by their decision in these cases, but also by the fact that they refuse to grant any license to hotel out the sanction of the law. It is an utter disregard of the law and the rights of the people. The judge sits to administer and but one explanation and that is a previous determination before hearing to refuse all applications. This is arbitrary and without the sanction of the law. It is an utter disregard of the law and the rights of the people. The judge sits to administer and not to make the law. To say that I will grant no license to anyone, or that I will grant it to everyone, is not to decide judically on the merits of the case, but to determine beforehand without a hearing or else to disregard what has been heard. It is to be determined, not according to law, but outside of law; and it is not a legal judgment but the exercise of an arbitrary will.

The discretion which the court is required to exercise is a sound legal discretion under the law upon the circumstances of each particular case as presented, and not upon the propriety or impropriety of granting licenses. It is the duty of the court to hear and determine each case upon the evidence, to ascertain the fitness of the applicant, the necessity of the house for the

accommodation of the public, and to see that the applicant has fully complied with the law; and when this is done the right to license is a legal incident which the court cannot withhold in a proper case and which ought not to be granted in an improper one. Where the applicant has failed to bring himself and his house within the provisions of the law he is not entitled to a license; but, upon the contrary, where the provisions of the law have been complied with and the public necessity requires the accommodation of the hotel for the entertainment of strangers and travelers, then the right to a license legally exists and the court violates the law in withholding it.

The fact that the supreme court in Toole's Appeal, 90 Pa. 376, declared that the exercise of the discretion of the court cannot be reviewed, has given rise to the exercise in many cases of an arbitrary discretion, and it is often cited to the court as an "authority to do as you please." It has had its effect in the present case.

Toole's Appeal is not authority for any such doctrine. Because the supreme court may not review the exercise of the discretion of the lower court, it does not follow that the court may then act arbitrarily in deciding these cases.

It affords a greater reason why the court should faithfully and sacredly observe the law and enforce it in its true spirit if no review can be had of its discretion. In the cases before us the reason why the license is refused is set forth so that the question may be presented to the court for review if any review is desired or can be obtained. I would have preferred that the full reasons could have been placed upon record, so that the question might be fully heard before the court. I have endeavored to do so in the short time I have had to prepare this opinion.

I have united in rejecting all the applications for license except five or six which I believe are absolutely necessary for the accommodation of the public. Wherever it was shown or the court had knowledge that there was no real necessity for the hotel as a house for the accommodation of travelers and strangers; where it was shown to the court that it was really intended as a drinking place, or that it would result as a resort for local drinkers; wherever it was shown that the applicant himself was a drinking man, that he kept a disorderly house, that he violated the law in selling to the prohibited class, or on Sunday, or election day; or wherever it appeared that due care

was not exercised by the landlord in the sales of liquors—in all such cases I have ever refused and will continue to refuse to grant license in this district. In all proper cases I feel it to be my duty under my oath of office to grant the license. For these and other reasons I dissent from the judgment of the majority of this court in these cases.

The dissenting opinion of FURST, P. J., in the applications of Gould and O'Neill, was as follows:

Under the law and the facts this license should be granted. I, therefore, dissent from the decree made by the associates.

On April 16, 1887, the day the opinions were filed, these appeals were taken.

On April 21, 1887, the following supplementary opinion was filed by MCCARTHY and FOREMAN, A.JJ.:

As there was a misunderstanding with His Honor, Judge FURST in the opinions written out by him, and signed by us—that said opinions did not fully set forth our reasons for refusing the licenses therein named, it is now agreed that we add or supplement these additional reasons, which shall be attached to said opinions by the clerk of the court and filed as a part of the record, and to have equal standing in date as if filed on the 14th of April with the opinions referred to above.

In the matter of the applications for license by Henry Leister, J. C. Swoope, H. C. Wallace, James O'Neill, and E. F. Gould.

Upon the application of Henry Leister, we refused said license because he had but fourteen petitioners for said license, while there were 207 signers to the special remonstrance against the granting of a license to the said Henry Leister, and further because Henry Leister was refused a license by the court a year ago because of wilful violation of the liquor laws.

Upon the application of J. C. Swoope, we refused a license because he had but fourteen petitioners for license, while 283 signed a special remonstrance against granting a license to said J. C. Swoope. Further, said J. C. Swoope was refused a license a year ago by the court, for violations of the liquor laws.

Upon the application of H. C. Wallace, we refused a license because he had but thirteen petitioners for a license, while there was a special remonstrance signed by 266 persons, against granting a license to said H. C. Wallace.

Upon the application of James O'Neill, we refused a license because it was known to the court that said O'Neill had violated the liquor laws last year, and therefore was not a proper person to be intrusted with a license.

Upon the application of E. F. Gould, we refused a license for the reason that it was known to the court that he had violated the liquor laws, and that he was not a proper person to be intrusted with a license.

Using a sound discretion, and after considering each application separately, we refused license to the persons before named, for the reasons stated, and for the further reason that said license, in each case, we do not consider necessary for the accommodation of the traveling public.

The assignments of error specified in each case the action of the court in refusing the license to the petitioner.

1. When he had complied with every requirement of the law and rules of court, when there was no remonstrance, evidence, or objection presented to the court that his house was not necessary for the entertainment of strangers and travelers.

2. When it was admitted and conceded by the court that his house was necessary for the accommodation of the public and entertainment of strangers and travelers, and that he had complied with all the requirements of the law.

3. For the reason only that they did not think it necessary to license a hotel to sell intoxicating liquors.

P. M. Lytle, R. Bruce Petrikin, and *M. M. McNeil,* for appellants.—Under the act of March 22, 1867, the court, in considering an application for liquor license, should have such regard to the number and character of the petitioners, for and against the application, as is required by all the circumstances of the case,—which include the knowledge possessed by the court, facts whereof judicial notice should be taken, the testimony of witnesses, the opportunity of knowledge of the petitioners, their bias, prejudice, interest, and like matters,—and grant or withhold the license accordingly.

It is the necessity for a hotel or eating house which is to be considered; the necessity for a license to sell intoxicating drinks follows as a necessary incident. Beaver County Licenses, 3 Pa. Co. Ct. 56, 19 W. N. C. 359.

Where the application is for a house not before licensed, perhaps the only evidence of its necessity is to be found in the papers filed, having due regard to the number and character of the petitioners and remonstrants. The best evidence of the necessity of a public house heretofore licensed is proof of the amount of the lawful business done by it during the preceding year. Lycoming County Licenses, 3 Pa. Co. Ct. 90, 19 W. N. C. 358.

The act of deciding is judicial, in which the private feelings of the judge can have no legitimate place. Every application must be determined on its own circumstances and merits, on its own evidence and facts. Schlaudecker v. Marshall, 72 Pa. 200; *Re* Conroy, 3 Pa. Co. Ct. 52.

"Our system of licensed inns and taverns," says Judge WOODWARD, in Omit v. Com. 21 Pa. 434, "is founded in the just idea that it is the duty of every community to provide for the accommodation of strangers and travelers who come into their midst. . . . To induce persons to establish such houses, and to maintain the requisite arrangements and attendants, a monopoly is offered them in the exclusive right to retail by small measure, vinous and spirituous liquors. . . . Such is the system for fulfilling the duties which the community owe to strangers and travelers."

If the law then intends that the discretion to be exercised must be a sound discretion and according to law, and the court of King's bench had a power to redress things that are otherwise done, then this court, if satisfied that the refusal of licenses was a mere arbitrary exercise of discretion and not the exercise of a sound judicial discretion according to the facts and circumstances of each case, has the power of the king's bench to give redress; for in statute giving existence to this court after enumerating its several powers the act concludes: "And generally shall minister justice to all persons and exercise the jurisdictions and powers hereby granted concerning all and singular the premises according to law, as fully and amply to all interests and purposes whatsoever as the justices of the court of king's bench, common pleas, and exchequer at Westminster or any of them can or may do." Bioren's Laws of Pa. 140; Brightly's Purdon's Digest, 1576.

W. McK. Williamson and *Samuel T. Brown*, for appellees. —The action of the court below in granting or refusing a license

is not the subject of appeal, and being discretionary with the court of quarter sessions it cannot be reviewed in the supreme court. Schlaudecker v. Marshall, 72 Pa. 200; Toole's Appeal, 90 Pa. 376; Reed's Appeal, 114 Pa. 452, 6 Atl. 910.

This court does not sit to review the opinions of judges. If the judgment is right, this court will not reverse because a wrong reason is given for it.

The act of 1867 has been construed and commented on in later cases, but not in Schlaudecker's Appeal. The latest and fullest review of this act, and the discretion it grants, is found in Reed's Appeal, 114 Pa. 452, 6 Atl. 910 (supplemented by an editorial note, 4 Cent. Rep. 909). In that case the license was granted by the court of quarter sessions; but although this court was of the opinion that the court below had not given due weight to the remonstrances against license, yet, inasmuch as the law gives no appeal, the supreme court had no jurisdiction, and the appeal was quashed, and the decree affirmed.

The act itself, the debates at the time of its passage (see Legal Record of 1867, pp. 523, 524), and this decision, all show clearly that the very purpose of the act was to give the people of the community a chance to be heard on the question of licensing grog shops in their midst, untrammeled with the question of necessity for a house to feed and lodge strangers and travelers. Toole's Appeal, 90 Pa. 376.

Error cannot be assigned for matters in the discretion of the court. Dubois v. Glaub, 52 Pa. 238; Waldron v. Waldron, 55 Pa. 231; Pringle v. Pringle, 59 Pa. 281.

It must be a flagrant abuse of the discretion vested in the court below, which will induce the supreme court to reverse. Christine v. Whitehill, 16 Serg. & R. 98, and Robeson v. Whitesides, 16 Serg. & R. 320.

A certiorari only brings up the record for review. The opinion of the court is no part of the record. This court only examines the regularity of the proceedings, and cannot look into the evidence, although incorporated in the opinion. Shenango Twp. v. Wayne Twp. 34 Pa. 184; *Re* Church Street, 54 Pa. 353; *Re* Kensington & O. Turnp. Co. 97 Pa. 260.

PER CURIAM:

The records in the cases before us are without fault, and as

the facts cannot be brought before us on appeal, we must affirm the certioraris, and dismiss the appeals.

We may observe, however, that if we are to regard the second opinion of the associates as containing a statement of the facts of the several cases, their power to refuse the licenses was undoubted, and was properly exercised. It is true, their first opinion, as drawn for them by the president judge, puts them in the awkward position of a clear violation of the prescriptions of the act of assembly; but this, on further consideration, they had a right to correct and set forth the facts on which they acted.

The judgments on the certioraris are affirmed and the appeals dismissed, at the costs of the appellants.

Achille Onofri, Plff. in Err., *v.* Commonwealth of Pennsylvania.

Upon the trial of an indictment for murder it is proper to read the indictment to the jury.

The action of the court below in refusing to compel the commonwealth to call a witness whose name is indorsed on the indictment and who is present in court under subpœna of the commonwealth is not reviewable on writ of error.

It is not error to permit the jury in a capital case to take out with them the indictment on which are indorsed a conviction of murder in the first degree upon a former trial and a subsequent order granting a new trial.

(Argued March 24, 1887. Decided October 10, 1887.)

July Term, 1886, No. 94, E. D., before MERCUR, Ch. J.,

Cited in Com. v. Barry, 8 Pa. Co. Ct. 216, 218, and in Com. v. Bell, 20 Pa. Co. Ct. 223, 228, 7 Pa. Dist. R. 54.

NOTE.—All witnesses who can testify to material facts in a criminal proceeding should be called by the commonwealth. Rice v. Com. 102 Pa. 408; Donaldson v. Com. 95 Pa. 21. But this is not required when the testimony would be merely cumulative. Com. v. Keller, 191 Pa. 122, 43 Atl. 198. And the appellate court will not reverse where the evidence could have been presented by the defendant. Com. v. Morrison, 193 Pa. 613, 44 Atl. 913. In Com. v. Fry, 198 Pa. 379, 48 Atl. 257, the lower court refused to compel the commonwealth to call the son of the defendant, who was the only eyewitness of the murder, and he was subsequently called for the defense.

GORDON, PAXSON, TRUNKEY, GREEN, and CLARK, JJ. Error to the Court of Oyer and Terminer for Philadelphia County to review a judgment on a verdict of guilty of murder in the second degree on an indictment for murder. Affirmed.

The defendant below was indicted for the murder of his step-daughter, Carlotta Cook, nine years old.

At the second trial, before HARE, P. J., the verdict of guilty of murder in the first degree at the first trial having been set aside and a new trial granted, it appeared that the death of the child was caused by a cruel and unmerciful beating inflicted on her by the prisoner with a strap, a rope, a broom handle, and a heavy coal shovel, because she was too weak and timid to practice walking the wire for acrobatic exhibitions.

The beating was done in the presence of her sister Mabel, about the same age, and her brother, also a child. There were no other witnesses of the act.

Other facts are stated in the opinion.

The court charged, *inter alia,* as follows:

"I have just told you, in pursuance of the prisoner's request, what you must do in point of law. He now asks me to tell you that you are the judges of that law. To declare the law, in cases of this description, is a duty which the law imposes on the court, and in so doing it clothes the court with authority to declare the law, and renders it the duty of the jury to heed the exposition of the law by the court. You have been sworn to try the cause according to the law and the evidence, and it is your duty to administer, not to make, the law. By the law is meant the law of the land—the law of Pennsylvania—and not what this or that person supposes to be the law. You are to determine from the evidence what are the facts, and say whether they come within the law. In that sense you are the judges of the law and of the facts." (Fourth assignment of error.)

"I repeat what I said before,—that the law supposes that men intend the consequences of their acts, and, when grievous bodily harm is inflicted by means that are calculated to produce and actually end in death, this is evidence of malice; and it is for the defendant to point out on his side or the commonwealth's something which may rebut the presumption of malice that would otherwise naturally arise." (Fifth assignment of error.)

"Taking the statements of the prisoner in conjunction with the testimony as to the condition of the body and the other evidence adduced by the commonwealth, I must confess that taking the commonwealth's case alone it appears to me that a pretty strong case is presented against the accused; but I must caution you again that you are the judges of the facts, and I only express my opinion to aid you. You will take it and consider it only as you regard it to be borne out by the evidence." (Sixth assignment of error.)

William W. Ker and *Joseph T. Ford,* for plaintiff in error.—In cases of felony, where the prosecutor does not think proper to examine any witness whose name appears on the back of a bill, the court will usually at the desire of the prisoner require such witness to be placed in the box as the witness of the Crown, in order that the prisoners may have the benefit of questioning him in cross-examination. This is not the practice in misdemeanors; nor is it a right in felonies. Hale, P. C. 157, note 6, referring to Reg. v. Vincent, 9 Car. & P. 91; Rex v. Beezley, 4 Car. & P. 220.

In criminal cases the jury are the judges of the law and the facts. Kane v. Com. 89 Pa. 522, 33 Am. Rep. 787.

The prisoner was entitled to have the court give a distinct, unequivocal, and unqualified answer to his point. Foster v. Collner, 107 Pa. 305; Huddleston v. West Bellevue, 111 Pa. 110, 2 Atl. 200.

Under our statute defining the degree of murder, the presumption against the accused rises no higher than that the homicide is murder in the second degree. Com. v. Drum, 58 Pa. 9.

Whenever it is sought to convict of murder in the first degree, the burden of proof is upon the commonwealth to show the circumstances necessary to raise the offense above murder in the second degree. Nor can this burden be shifted from the commonwealth upon the shoulders of the defendant. Murray v. Com. 79 Pa. 316.

If the tendency of the charge was to mislead the jury, it is ground for reversal. Bisbing v. Third Nat. Bank, 93 Pa. 79, 39 Am. Rep. 726; Pistorius v. Com. 84 Pa. 158; Pannell v. Com. 86 Pa. 260; Fawcett v. Fawcett, 95 Pa. 376.

The statements of the prisoner, referred to by the court, were what the prisoner had said to the officers and different other per-

sons at and before his arrest, according to the testimony of those persons called by the commonwealth to prove the statements.

A judge may rightfully express his opinion respecting the evidence. Kilpatrick v. Com. 31 Pa. 198; Johnston v. Com. 85 Pa. 65, 27 Am. Rep. 622.

But a judge may not express his opinion of the guilt of the prisoner, and instruct the jury to consider it as a part of the case.

It is error for the court in a capital case, in its charge to the jury, prominently to present the theory and strong points of the prosecution and ignore that of the defense. Goersen v. Com. 99 Pa. 388; Pauli v. Com. 7 W. N. C. 396.

The instruction of the court to the jury, "to pay no attention to the indorsements upon the indictment," may or may not have been regarded by the jury. How far the knowledge derived by the jury from the indorsements influenced them in arriving at a verdict, it is impossible to determine. The court had it in its power to keep that improper and unlawful knowledge from the jury, but refused to do so.

Articles offered in evidence during the trial may be taken out by the jury. Udderzook v. Com. 76 Pa. 351.

But in this case there was no necessity for handing the indictment to the jury against the protest of the prisoner.

George S. Graham, Dist. Atty., for the commonwealth.—From time whereof the memory of man runneth not to the contrary, the verdicts in the quarter sessions, and in the oyer and terminer courts in Philadelphia, have been indorsed on the bills of indictment.

In the case of Goersen v. Com. 99 Pa. 388, the first verdict was indorsed on the indictment as in this case, and according to the unvarying custom; and the bill so indorsed was handed to the jury, and the prisoner was convicted on the second trial of murder in the first degree. The case was brought here for review and judgment was affirmed. This point, however, while raised in the court below and overruled by the late Judge Ludlow (than whom there was no abler criminal-law judge in this commonwealth), was not assigned as error in this court.

The jury are entitled to have the indictment out with them. In fact they are entitled to have the whole record.

OPINION BY MR. JUSTICE PAXSON:

The first two assignments of error are without merit. It was entirely proper to read the bill of indictment to the jury. It is not pretended that it was not read precisely as it was found by the grand jury.

The third assignment alleges that "the court erred in overruling the motion made by the prisoner,—that the court direct the district attorney to call the name of Mabel Cook as a witness for the commonwealth; her name being indorsed upon the bill of indictment, she being present in open court under subpœna of the commonwealth.

It is a sufficient answer to this to say that a writ of error will not lie to such refusal of the court.

Nor do we find any error in those portions of the charge referred to in the 4th, 5th, and 6th assignments. It would be a waste of time to discuss them.

The 7th and last assignment alleges that the court below erred in allowing the bill of indictment with the indorsements thereon to go out with the jury, against the objection of the prisoner.

The bill of indictment is always sent out with the jury when they retire to deliberate upon the verdict. The whole difficulty was that the former conviction of the prisoner was indorsed upon the back of the bill. The first conviction had been of murder in the first degree. This conviction was not satisfactory to the trial judge, who set it aside and granted a new trial, upon the ground that the weight of the evidence was against the degree of murder as found by the jury. The record of the former conviction as well as the order granting the new trial was indorsed upon the back of the bill.

We learn from the docket entries in the case that the prisoner objected to the bill of indictment being handed to the jury with indorsements thereon made subsequent to the finding thereof; and that the objection was overruled and the jury instructed to pay no attention to the indorsements upon the indictment. The bill of exceptions is silent as to this matter; and as there is no exception the point is not properly before the court. As, however, the learned district attorney waived this omission, I do not hesitate to say that it has little merit. If there was poison, the antidote went with it. The order for a new trial showed that the conviction of murder of the first degree was wrong. Upon the second trial a conviction in the first degree was not claimed.

Aside from this, the learned judge below instructed the jury that they must entirely disregard the indorsements. We must assume that jurors have common sense and pay some regard to the instructions of the court.

The greatest effect that could be claimed for the indorsement is that it brought home to the knowledge of the jurors the fact that upon a former trial the prisoner had been convicted of murder of the first degree, and that such conviction had been set aside by the court. The chances are at least even that the jurors had such knowledge when they entered the box. In a case of homicide attracting as much attention as this one did, the fact of a former conviction must have been known almost to every man in the county; and those who did not know it probably could not read, and would be illy qualified for jury duty. It is not pretended that this knowledge acquired through the newspapers or from other sources would have been a ground of challenge to a juror; nor do I see any reason why it should invalidate a verdict because acquired from the indorsement on the bill of indictment.

Judgment affirmed.

David L. King, Plff. in Err., *v.* Commonwealth of Pennsylvania.

On an indictment for murder where the death was caused by a pistol shot which pierced the *medulla oblongata*, and where it became important to determine the effect of the shot in order to ascertain whether a pistol had been placed near the body of the deceased to suggest that the killing was

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NOTE.—An expert may give his opinion as to the manner in which the injuries were inflicted. Com. v. Crossmire, 156 Pa. 304, 27 Atl. 40. Or as to the place at which the deceased stood. Com. v. Lenox, 3 Brewst. (Pa.) 249. Or the direction from which the blow came. Hopt v. Utah, 120 U. S. 430, 30 L. ed. 708, 7 Sup. Ct. Rep. 614; KING v. COM. was followed by the lower court in Com. v. Fry, 198 Pa. 379, 48 Atl. 257, opinions being given as to the position in which the deceased stood. Objections to the evidence were overruled by the court in refusing a new trial, and it was not made the basis of an assignment of error, and therefore does not appear in the reported case.

Proof of uncommunicated threats of the deceased have been held admissible since KING v. COM. as tending to show his motive and intention, and thus giving rise to an inference that in the fatal encounter he was the aggressor. Com. v. Keller, 191 Pa. 122, 43 Atl. 198.

committed in self defense, the evidence of a physician that after the *medulla oblongata* was struck by the bullet the deceased would have neither volition nor consciousness was competent.

Articles found upon the dead body, including letters from a witness who has testified, and which contained matter in contradiction of her evidence as to the relations between the deceased and herself, and which the defendant has agreed should be considered in evidence, are admissible although the defendant attempted to withdraw consent.

Evidence that the defendant stated that he had seen the deceased at a drug store, and that he was very nervous, and that he requested the witness to go there and hear if deceased was making threats against him, saying that if so he would swear his life against him, is admissible without proof that threats actually made by the deceased had been communicated to the defendant.

An instruction that if the defendant, anticipating the arrival of the deceased, prepared himself to carry out a previously formed intention to take his life, which he executed immediately upon meeting him, then the preparation of the means to accomplish this result, the entire absence of provocation at the time of inflicting the wound, the deadly nature of the weapon used and the vital part at which it was aimed, all tend to prove that the killing was wilful; that there was time to deliberate; that the shot was premeditated; that there was no legal ground of provocation, and no impetuous rage or passion; and the prisoner would be guilty of murder in the first degree—properly presented the case to the jury.

It was proper to instruct the jury that when it comes to the question whether one man shall flee or another shall die, the law decides that the former shall rather flee than that the latter shall die, and that to excuse homicide on the plea of self defense it must appear that the slayer had no other possible, or at least probable, means of escape.

(Argued October 3, 1887. Decided October 17, 1887.)

October Term, 1887, No. 129, W. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Error to Oyer and Terminer of Clarion County to review a conviction of murder in the first degree. Affirmed.

The facts of the case appear from the following portions of the charge of the court below, WILSON, J.:

The indictment charges and alleges that the prisoner before you murdered James C. Davis. This allegation the prisoner has denied in open court by his plea of not guilty to the bill of indictment found by the grand inquest; and the allegation and denial form what in legal parlance is called the issue; this issue you are to pass on and determine.

"James C. Davis and wife were at the house of Mrs. Dinsmore, in St. Petersburg; the wife left for St. Louis; some time afterwards her husband followed her there. Mrs. Dinsmore boarded Mr. Davis up to three or four days before he started away: he was absent three or four weeks. During his absence Mrs. Dinsmore addressed to him two letters, and he sent her one letter. These letters were received in evidence and read. Davis returned to St. Petersburg on Thursday, February 3; and on that day and the two days following he called at the Dinsmore house. On Friday he came there at 10 o'clock in the morning, took dinner with Mr. King, Mrs. Dinsmore and her daughter Lilly.

"The commonwealth to maintain the issue introduced evidence tending to establish the following facts: That between 2 and 3 o'clock in the afternoon of Saturday, February 5, the prisoner shot and killed James C. Davis, in the borough of St. Petersburg, at the house of Ella Dinsmore, in the dining room. Immediately after the act was committed Mr. King left the house and proceeded toward the office of the burgess, and within the hearing of several persons publicly stated that he had shot Davis; and when interrogated as to why he had done so, replied that he had to do it and it was in self defense. To others he stated that he had killed him, and shot him in the eye, that he would not have him come in and swing his revolver over a sick woman. He surrendered himself to the officers of the law and was soon afterwards taken into custody. Dr. Wireback testified as to the position and examination of the dead man as follows:

" 'Soon after the killing I was called to see the body. I found the body lying in the corner of the dining room, with the right shoulder leaning against the partition between the dining room and the sitting room; the left shoulder on the floor; the body lying on the left hip, that is, not completely on the side, but about nearly half way on the side and on the back, with right foot extended, or nearly so, reaching almost, if not quite, to the carpet strip, at the door leading into the small bed room. The left arm was doubled up under him, which caused the throwing up of the shoulder in that way; and the shoulder being thrown up in that way to a certain extent prevented the head from going over as far as it would have gone had there been no support there; the shoulder being thrown up that way supported the head

to a certain extent; the head was thrown back and was supported on that shoulder. The right hand was lying over the right side of the body, and my impression is that it touched the floor; if it did not, it was very near the floor. I am not quite positive as to the hand, whether it touched or did not touch the floor; but the hand was just in that position that you would drop your hand without any voluntary act of either closing or opening, just as your hand would naturally be without putting any of the muscles into play, without volition. The revolver was lying 4 or 5 inches from the hand, the butt or handle towards the hand. There was a wound just below, close to the upper edge of the eye cavity; I noticed powder marks on the left side of his face, and I would judge that the muzzle of the weapon was held about 12 or 14 inches from the face when discharged. The effect of a wound such as Mr. Davis received would be the complete relaxation of all muscular tissue, and it would cause him to immediately drop the revolver. Mr. Davis's death was caused by a pistol shot wound, made in the manner that I have described. After the *medulla oblongata* was struck by that bullet Mr. Davis would have neither volition nor consciousness. When I first saw the body it was yet warm, there was no rigidity or stiffness.'

"About thirty-eight days thereafter, three physicians exhumed the remains, held an autopsy, and brought away with them the skull of the deceased, which was produced and offered in evidence, together with an exhaustive recital of the result of their examination and their opinions thereon, the pistol bullet found in the skull, and testified that the cause of death was the pistol shot wound. Diagrams showing the interior apartments and arrangements of the Dinsmore house, made from actual measurements in the month of February, and claimed to be an accurate representation, and of the surroundings, were explained for the information of the jury. A justice of the peace, acting coroner, impaneled a jury and held an inquest on the dead body during the afternoon of the day of the killing. The personal effects found upon the clothing of the deceased were identified and received in evidence, among which was the revolver, which had dropped from the hands of the deceased and was found near his body; it was a six shooter and had in its six loads. Another revolver, a five shooter, alleged to be the prisoner's, when delivered

to the coroner's jury contained four shells loaded and one shell unloaded.

"Several witnesses testified to statements made at different times and places shortly before and after the shooting in question, by the prisoner, as to his condition of mind, feeling and intention toward the deceased, among which are as follows: 'I have the oldest right there, and I'll be damned if I don't shoot him.' 'If I shot him where I intended to, it would kill him.'"

William Fowles testified:

"'On the day of the killing I had a conversation with Mr. King in my store, before the killing. I also had a conversation with him after the killing of Davis. At the last conversation King had neither hat, coat, nor vest on. I cannot fix the time exactly, but I think that it was between 2 and 3 o'clock. King comes into the store and says: "Billy, I have killed him." I said: "Killed who?" and he said: "I have killed Davis." I said: "I guess not," and he said: "Yes, I have killed him, and he is lying down there now." I said: "That is a bad job, Dave," and he said: "I had to do it, he (Davis) was kicking the door down and I had to do it to save myself;" and he said "I want to give myself up." I said: "I have no right to arrest you; you will have to go to the authorities and give yourself up." I had a conversation with Mr. King on Friday, at the same place, between 12 and 1 o'clock, or along there. Mr. Samuel Edinger was present and he and I were talking. King came in and he says: "Billy, give me some tobies." I said: "All right;" and when I was giving him the tobies I made the remark: "I suppose you will have to take a walk," and he said: "Not much!" I said: "You will have to talk a walk; Mr. Davis has come to town," and he says: "Not much! I have got something here that will fix Davis!" and he pulled a revolver out of his pocket, but I can't tell you out of what pocket. I was standing behind a cigar case and he held the revolver up in his hand in that shape, up above the case, and he was flourishing it there, and what remark he made I don't know, at the time. It was a self cocker; and I said: "Dave, put that in your pocket; I don't want that flourishing around here; it is a self cocker and a dangerous weapon; put it in your pocket." I saw King on Saturday before the killing, I should think between 1 and 2 o'clock, at the same

place. He comes in and he says: "I met Davis in the drug store and he seems to be very much excited; I think he is after me, but if he is, he is not going to get the drop on me. If he draws a revolver on me I will shoot him dead on the spot." And he was standing and he reached in his overcoat pocket and pulled out a revolver and held it up in his hand, and he says: "I will shoot him with that."

Cross-examination: The first conversation was on Friday.

"*Q.* That conversation was introduced by you in twitting King with the remark that you guessed he would have to take a walk?

"*A.* Yes, sir; and he replied that he guessed not. About 1 o'clock of the day of the homicide King came into my store again. He said he had met Davis in the drug store, and he said: 'I think he is after me.'

"*Q.* Didn't King say to you that he had met Davis in the drug store and he appeared very much excited, and he thought he was after him?

"*A.* Yes, that is right.

"*Q.* Is that all he said, that Davis looked excited and he thought he was after him?

"*A.* Yes, sir; and that he would not get the drop on him. He says: 'If he draws a revolver on me I will shoot him dead.' That is the words he used to me. After the shooting King came into my store and told me that he had shot Davis. He says: 'I have killed him.'

"*Q.* That he was breaking the door in on me and I had to do it?

"*A.* Yes, sir. I told him to go to the authorities. He started out and went up the street toward Whitling's.

"Redirect examination: King said Davis was breaking the door in. He did not say 'on him.'

"The facts developed on the trial to maintain the issue on the part of the prisoner were substantially that on the evening of February 3d the prisoner was in attendance at an entertainment in the opera house in St. Petersburg; George Ruffner, a boarder at the house of Mrs. Dinsmore, who had seen the deceased in the Adams House and had been asked by him if King was boarding at Mrs. Dinsmore's, and replied that he was, entered the opera house and informed King that Davis had returned, and of the inquiry concerning him. The defendant then boarded and slept

in the Dinsmore house, and continued to remain there until after the death of the deceased. On the afternoon of February 5, before the commission of the offense charged, the inmates of tho house were Mrs. Dinsmore, her daughter, Mrs. Cotton, and the prisoner. What transpired after the arrival of the deceased is explained in the testimony of Mrs. Dinsmore, as follows:

" 'On Saturday afternoon of the 5th of February between 1 and 2 o'clock, Davis came to my house; about fifteen or twenty minutes before that King had come and gone into Ruffner's room and laid down on the bed. Davis rang the bell and came into sitting room and sat down, and after some conversation asked where King was, and said that man King he was going to kill. He had his hand in his overcoat pocket. I asked him what he had against King. He then jumped up off the chair, drew the revolver to the top of his pocket, and said he would blow my brains out. My daughter said: "That is pretty big threats." Davis stepped into the dining room and drew his fist back and said for her to shut up her mouth or he would drop her to the floor. Mr. King called my daughter to his room; afterwards she came out, went out the front room and started out the door; then Mr. Davis made a grab for her and told her to come back or he would blow her brains out. Mrs. Cotton called Davis to her room; I went and he followed me; she asked him not to make any fuss or disturbance on her account and he said he would not; and he then drew the revolver out of his pocket, pulled it over my head, and then jammed it against my temple; I backed out of the bed room and walked backwards till I got to about the middle of the dining room, and he followed after me; I then went to the room where King lay and as I was going there Davis told me not to make any alarm or he would blow my brains out and blow King's out; I opened the door and stepped into the room, and as I stepped into the door King was lying on the bed. He got up off the bed and stepped to the back of the door; I shut the door and turned up the thumb latch; there was something against the door like a kick and a push, and the door gave away. Davis was on the outside of the door and had his revolver in his hand, saw King standing there, drew the revolver at his head and said: "Oh, you!" and Mr. King jumped at the right of me from where he stood and Davis jumped his head down that way, and I heard the report of the

pistol. I then walked out and went up town. Davis remained in the house with my consent; I did not order him out.'

"Mrs. Celesta Cotton, who said she had been doing housework at Mrs. Dinsmore's, testified:

" 'On the afternoon of the 5th of February I was sick in bed at Mrs. Dinsmore's. I called Mr. Davis to my bed room; Mrs. Dinsmore came in and Davis followed her; I asked him if he would not make any fuss for I was sick and I was afraid it would make me worse. He said no, he wouldn't; then he said he had been drinking, but not very much, and again said: "No, Lesta, I won't make any fuss, for your sake;" Mrs. Dinsmore said, "No, Mr. Davis, you ought not to make any fuss, for it might make her worse." Just then Mr. Davis jerked the revolver out of his pocket and whirled it around a couple of times and pointed it at Mrs. Dinsmore's forehead, saying that he would blow her brains out. Mrs. Dinsmore then walked backwards out of the bed room; Davis followed her; I heard them walk through the dining room; I could see about half ways through the dining room; I heard a door open and shut, then heard something like a kick, I thought it was; then heard a door slam back against the wall, then I heard a pistol shot and heard something fall; just in a second I saw Mrs. Dinsmore walk out; King walked out after her in a second or two.'

"It further appears from the testimony that between 1 and 2 o'clock on the Saturday afternoon the deceased was in the Adams House, where he took a drink of whisky, and after stating to Mr. M'Cafferty that he had a good deal of trouble, that King kept his hands in his overcoat pocket on his revolver, but he could shoot as quick as he (King) could, said: 'Mac, don't you think I am straight enough to shoot straight?' asked him not to divulge what he said, and then went out, and in about an hour he was dead.

"J. S. Craig testified: 'King was in my drug store, Davis came in, they were eyeing each other; King had his hands in his pocket and walked out; Davis said: "Did you see the ——— ———?" (using an opprobrious epithet) "He had a pistol in his pocket but I have a d———d sight better one," and he pulled it out and said: "I ought to shoot him and if it had not been for my respect for you I would have shot him." He walked a crack and said: "I am not very drunk." He left the store and went in the direction of the Dinsmore house at fifteen minutes after

2 o'clock in the afternoon; fifteen or twenty minutes after I heard of the tragedy. Davis appeared to be in agony and was very much agitated in his mind.'

"To the witness, Brossman, King said: 'I saw Davis at Craig's drug store; he was very nervous. If Davis ever pulls a revolver on me, I will shoot him. I want you to go down to Craig's drug store and hear if Davis was making threats against me; if he is I will swear my life against him.' There was no evidence of any threat or declaration of Davis having been communicated to King.

"The commonwealth in rebutting called members of the coroner's jury to contradict the testimony of Mrs. Dinsmore and Lilly by showing that what they testified to before the coroner's jury was different from what they stated on this trial, and also other declarations made by Mrs. Dinsmore to Scott Higgins.

"The foregoing compendium of the testimony contains the main facts elicited during the trial. Any material omissions will be supplied by the jury from their recollection of the proof. The issue is clearly defined: The commonwealth alleges that the prisoner at the bar shot and killed the deceased; the prisoner does not deny the commission of the crime but alleges that the act was done in self defense."

The jury returned a verdict of guilty of murder in the first degree; and a motion for a new trial having been denied, sentence and judgment were pronounced, and defendant took this writ, specifying the following assignments of error:

1. The overruling of the objection of defendant's counsel to the admission in evidence of the two small bottles and contents.

2. The overruling of the objection of defendant's counsel to the admission of Dr. I. J. Wirebank's evidence in answer to the hypothetical question "Will you please state, on the supposition that the deceased held in his hand a revolver, pointed at another person, what the effect of that wound would have been upon the hand and the weapon? You have stated what it would be upon the object and life; now please answer that, what in your judgment would have been the result on that hand and a pistol?"

3. The overruling of the objection of defendant's counsel to the admission of evidence in answer to the question: "Then, supposing the circumstances detailed in the previous question to be correct, could that revolver, in your judgment, have been found

in the position in which you discovered it, supposing no interference in the mean time?"

4, 5, 6. The overruling of objections of defendant's counsel to the admission of evidence in answer to certain questions, substantially the same and as follows: "Suppose the deceased, Mr. Davis, to have been standing within 14 or 16 inches of the defendant, King. Davis on the outside of that strip of carpet, King inside of it in the little room, and this pistol in the hands of Davis, extended towards King, under the circumstances, if the *medulla oblongata* had been wounded as you say, do you believe, as a physician and expert, that that pistol would have been found on the floor, within 4 or 6 inches of the right hand of the deceased, and lying parallel with his hand, and the butt towards that hand?"

7, 8. (In relation to the manner of examination of certain witnesses.)

9. The overruling of the objection of defendant's counsel to the following offer made by counsel for the commonwealth, and to the admission in evidence of two letters written by Mrs. Dinsmore to Mr. Davis, the deceased:

Mr. Moore, for commonwealth: I now propose to offer and read the letters that were identified by Mrs. Dinsmore and shown to defendant's counsel this morning—commonwealth's exhibits D and E.

Mr. Weidner, for defendant: For what purpose?

Mr. Moore, for commonwealth: For the purpose, first, of showing the relation of Mr. King and Mrs. Dinsmore, and for the purpose of contradicting Mrs. Dinsmore's statements in relation to that intimacy.

Mr. Reed, for defendant: We object to that as totally irrelevant and incompetent as to contradiction of the relation between Mrs. Dinsmore and Mr. King; it has nothing to do with this case, is not relevant, is incompetent, and could not be given in evidence; and the court has ruled it out, because Mrs. Dinsmore is not on trial; nor would any relationship affect either her credibility as a witness, nor could the defendant's right be prejudiced by any act that she might have done.

By the court: I understood this morning that you agreed to admit both the letters, and that they might be considered in evidence at the time they should be offered. You said you had no

objection to them, and they could go in; the commonwealth's counsel then said they would not offer the letters at that time.

Mr. Weidner, for defendant: If I said that, I object to them now; and I insist on my objection, and a ruling, and, if the court admits them, on an exception.

By the court: The letters are admitted because the defendant's counsel at a prior session agreed they should be considered in evidence. They are, therefore, admitted and the objection is overruled.

10. The court erred in charging the jury as follows:

"Several witnesses testified to statements made at different times and places, shortly before and after the shooting in question, by the prisoner, as to his condition of mind, feeling, and intention towards the deceased, among which are as follows: 'I have the oldest right there and I'll be d——d if I don't shoot him.'

"There is nothing in the testimony containing this expression of King's to show that the same referred to the deceased."

11. Referring to the words above quoted (I have the oldest right there, and I'll be d——d if I don't shoot him) as expressing the intention of the defendant against the deceased, in that there was no testimony to show that the defendant in using said words referred to the deceased.

12. The court erred in charging the jury as follows:

"To the witness, Brossman, King said: 'I saw Davis at Craig's drug store; he was very nervous. If Davis ever pulls a revolver on me, I will shoot him. I want you to go down to Craig's drug store and hear if Davis was making threats against me; if he is I will swear my life against him.' There was no evidence of any threats or declarations of Davis's having been communicated to King."

13. Charging the jury as follows:

"While the statute of this state provides that a person charged with the commission of misdemeanor, or felonies of whatever grade, shall at his own request, but not otherwise, be deemed a competent witness, his neglect, omission, or refusal to testify shall not create any presumption against him; nor shall any reference be made to nor any comment be made upon such neglect, omission, or refusal, by counsel in the case, during the trial of the case. The jury should decide the case with reference alone to the testimony actually introduced before them and with-

out reference to what might or might not have been proved if other persons had testified."

14. Adopting and applying to the facts of this case the facts and principles of law arising thereon, as found and laid down in the charge of Judge AGNEW to the petit jury in the case of Com. v. Drum, 58 Pa. 14.

15. Charging the jury as follows:

"On the part of the commonwealth it is alleged that in consequence of previous statements of Davis, his unexpected return from St. Louis to St. Petersburg, King armed himself with a deadly weapon with the intention of using it upon the deceased, if they met; that he knew that Davis was coming to the Dinsmore house on Saturday; that he retired to the room used by the boarder Ruffner; did not go to bed, but waited for an opportunity to carry out his previously formed intention to take life; and as soon as he saw Davis he immediately discharged his revolver. In this view of the case, the preparation of the revolver, the entire absence of provocation at the time of giving the wound, the deadly nature of the weapon and the vital part at which the weapon was aimed, together with the circumstances proved on the trial, all tend to prove that the killing was wilful; that there was time to deliberate; that the shot was premeditated; that there was no legal ground of provocation and no impetuous rage or passion. If you believe this is the true version of the case, then you are asked by the commonwealth to convict the prisoner of murder in the first degree, on the ground that he killed the deceased wilfully, deliberately, and premeditatedly, and with malice aforethought. If you should find this to be so, it would constitute in law murder in the first degree."

16. Charging the jury as follows:

"To excuse homicide on the plea of self defense it must appear that the slayer had no other possible or at least probable means of escaping."

17. Charging the jury as follows:

"When it comes to a question whether one man shall flee or another shall die, the law decides that the former shall rather flee than that the latter shall die."

18. The court also erred (when the jury returned for further instructions after they had been considering and discussing the guilt or innocence of the defendant for about seventeen

hours) in not charging the jury as to the law of self defense, as requested by defendant's counsel.

19. The court erred (when the jury returned into court for further instructions and requested that the portion of the charge including reasonable doubt be again read to them) in reading a portion of the charge which the jury did not request to be read.

John W. Reed, Harry R. Wilson, and *W. A. Hindman,* for plaintiff in error.—The first specification of error relates to the admission of irrelevant and immaterial evidence.

It is error to admit evidence, the tendency of which is to lead the minds of the jury into an irrelevant inquiry. Cummings v. Williamsport, 84 Pa. 477.

In criminal cases the courts rarely presume that the particular evidence which was wrongfully admitted could have had no influence on the deliberations of the jury; and there are few exceptions to the general rule that in such cases of misruling the defendant has a right to have his case given to another jury in a legal shape. Wharton, Crim Pl. & Pr. § 802.

The second, third, fourth, fifth, and sixth specifications of error may be considered together, and raise the single question, *viz.:* Is it error to permit a hypothetical question to be put and answered, which requires the witness to guess at the essential and material facts upon which the correctness of his answer depends, and which answer will accordingly sustain the theory of the commonwealth or the theory of the defendant as the witness may favor the one or the other in his guessing?

The seventh specification of error illustrates the character of attack made on every material witness called on the part of the defendant, and its permission by the court below contravened the legal principle that a witness shall not be required to answer questions, when collateral to the issue, put to him on cross-examination for the mere purpose of wounding his feelings and bringing him into disgrace, or to excite the prejudice and inflame the minds of the jury against him. Wharton, Ev. § 472.

The eighth specification of error covers an attempt to attack the credibility of the witness in a way unknown to the law.

The ninth specification of error contains the offer and admission in evidence of the two letters written by Mrs. Dinsmore to the deceased.

These letters were incompetent to affect the defendant; he had nothing whatever to do with writing the letters, nor had he any knowledge of them whatever, either before or after they were written. Zell v. Com. 94 Pa. 274.

These letters also were irrelevant and should have been excluded. It was an attempt, and the tendency was, to fasten upon the defendant the commission of a separate and distinct crime from that charged in the indictment, which is not permissible. Snyder v. Com. 85 Pa. 521.

It was also an attempt, and the tendency was, to affect the credibility and impeach the character of the defendant's most material witness by evidence of particular acts of misconduct; and its admission for that purpose was improper. Zell v. Com. 94 Pa. 274; Snyder v. Com. 85 Pa. 521.

If counsel had consented that these letters might go in evidence, that consent was withdrawn before they were offered, and their admission objected to; but we take it as settled law in a case of this kind that the defendant could not consent or waive his rights to a legal trial, nor could counsel do so for him. Mills v. Com. 13 Pa. 630; Peiffer v. Com. 15 Pa. 470, 53 Am. Dec. 605; Meyers v. Com. 83 Pa. 141.

The tenth and eleventh specifications of error may be considered together. The court here assumed the very point at issue. There was no evidence that the statement here mentioned referred to the deceased; but the court inferred and stated to the jury that it did.

Such assumption of fact by the court is error. Musselman v. East Brandywine & W. R. Co. 2 W. N. C. 107.

It was a question proper for the consideration of the jury, and its withdrawal from their consideration by the court was error. Oram v. Rothermel, 98 Pa. 300.

It was a binding instruction what inference the jury was to draw from the facts in evidence. Wenrich v. Heffner, 38 Pa. 207.

The twelfth specification of error covers the withdrawal, by the court, of a material fact from the consideration of the jury. It was of vital importance for the defendant to show that he had knowledge of the threats made against him by the deceased, and this appeared in the testimony of the witness, Brossman; but the court instructed the jury otherwise, and in quoting this witness's testimony gave that part to the jury which was against

the defendant and excluded from their consideration that part which was for him.

The thirteenth specification of error covers the reference of the court to the neglect, omission, or refusal of the defendant to testify in his own behalf, and the comments made thereon. The act of May 21, 1885, prohibits any reference to or comments upon such neglect, omission, or refusal to testify, by counsel during the trial of the cause; and in the case of Com. v. Brown, 16 W. N. C. 557, Judge GALBRAITH in a very clear and forcible opinion granted the defendant a new trial because the district attorney, during the trial of the cause, inadvertently referred to the fact that the defendant, who was charged with the crime of murder, was a competent witness.

The act of May 23, 1887, which was passed after the trial of this case, provides that such neglect or refusal shall not be adversely referred to by court or counsel during the trial. The word "adversely" does not appear in the act of 1885.

The fourteenth, sixteenth, and seventeenth specifications of error relate to what we consider a just and legal cause of complaint. The charge of Judge AGNEW in the case of Com. v. Drum, in our judgment is a very severe charge; and while it may be admitted that it was proper and applicable in that case, it does not necessarily follow that it was applicable to the case in hand. Drum was attacked in the public street, and the defendant in this case was attacked in his own habitation; and the law as applicable to self defense in the one case is not applicable in the other.

When a person is attacked in his own house he need retreat no further. Here he stands at bay and may turn on and kill his assailant if this be apparently necessary to save his own life; nor is he bound to escape from his own house in order to avoid his assailant; and is not bound to retreat out of his own house to avoid violence, even though a retreat might be safely made. 1 Wharton, Crim. Law, § 502.

A felonious attack on a house or its inmates may be resisted by taking life. Id. § 503.

The protection of the house extends to each and every individual dwelling in it. Id. note 4, § 505; Com. v. Daley, 2 Clark (Pa.) 370.

A house of ill fame affords the inmates, in the eyes of the law,

the same measure of protection as any other dwelling house. People v. Rector, 19 Wend. 591.

The fifteenth specification of error covers that part of the judge's charge purporting to give the commonwealth's version of the case. In this epitome the court assumed material facts or allegations not made by the commonwealth and not justified by the testimony, and which were directly opposed to the facts in evidence.

If the court misleads the jury by directing their attention to a point on which there is no evidence, it is error. Hersheaur v. Hocker, 9 Watts, 455; Snyder v. Wilt, 15 Pa. 59–64.

The admission of allegations, without evidence to support them, if calculated to mislead the jury, is error. Greber v. Kleckner, 2 Pa. St. 289.

If the language of the charge as to the true character of the testimony tends to mislead the jury it is ground of reversal. Fawcett v. Fawcett, 95 Pa. 376.

A charge which misleads differs from a mere omission to instruct. Pennsylvania R. Co. v. Berry, 68 Pa. 279.

Where a state of facts could not be inferred on a demurrer to evidence, it is error to submit it to the jury as possible. Haines v. Stouffer, 10 Pa. 363.

It is error for the court to assume allegations of fact which the testimony does not justify. Egbert v. Payne, 99 Pa. 244; Musselman v. East Brandywine & W. R. Co. 2 W. N. C. 105.

The eighteenth and nineteenth specifications of error may be considered together. Here the court again repeated the objectionable part of his charge referred to in the fifteenth specification of error.

The twentieth and twenty-first specifications of error may be considered together.

It is the duty of a judge trying a man for his life to charge fully upon the law as applicable to the facts. The rule that a judge is not to be convicted of error for what he omits to say will not do. The prisoner has a right to have the jury properly instructed upon every question of law legitimately raised by the evidence. Meyers v. Com. 83 Pa. 141.

The twenty-second and twenty-third specifications of error may be considered together. The defendant was deprived of a trial by an impartial jury surrounded by all the safeguards established by law.

The separation of the jury during the trial of a homicide case gives rise to a presumption of improper influence which the prosecution is bound to remove. Goersen v. Com. 106 Pa. 477, 51 Am. Rep. 534; Moss v. Com. 107 Pa. 270.

When the self-governing power is wanting, whether it is caused by insanity, gross intoxication, or other controlling influence, it cannot be said truthfully that the mind is fully conscious of its own purposes, and deliberates or premeditates in the sense of the act describing murder in the first degree. Jones v. Com. 75 Pa. 406.

There must be a fully formed purpose to kill, with so much time for deliberation and premeditation as to convince that this purpose is not the immediate offspring of rashness and impetuous temper, and that the mind has become fully conscious of its own design. Green v. Com. 83 Pa. 77.

This court must be satisfied that the ingredients of murder in the first degree exist in the evidence. Act of February 15, 1870; Grant v. Com. 71 Pa. 505.

Quære,—Whether this court will not reverse if not satisfied beyond a reasonable doubt that the defendant had the time and the power to deliberate on his act. Meyers v. Com. 83 Pa. 142.

Frank R. Hindman, Dist. Atty., and *W. D. Moore* for the commonwealth, defendant in error.

PER CURIAM:

After listening to the able and learned arguments of the counsel for the plaintiff in error, and examining with close attention the assignments of error in this case, we fail to discover the slightest fault committed in the court below. Not one of the exceptions contains anything that is novel, except, perhaps, the fourteenth. They have all, in one shape or the other, been repeatedly before us, and as repeatedly overruled.

The articles found upon the dead person and the opinions of the experts were properly admitted in evidence. So, also, were King's threats, and Mrs. Dinsmore's letters. Neither is the complaint that the court did not fully and properly instruct the jury on the law of self defense, a just one, for the charge of the learned judge is full and complete on all points, and we do not know how a better one could have been framed.

It is true the quotation from Com. v. Drum, 58 Pa. 14, em-

braced by the fourteenth assignment, might well have been omitted, for it added nothing to what the learned judge said; but as it was made part of the charge, and certainly did the defendant no harm, we may pass it as immaterial.

Nor can we agree that the ingredients necessary to constitute murder in the first degree were wanting in the evidence. Of course, had the jury believed the testimony on part of the defense their conclusion doubtless would have been different from what it was; but the credibility of the witnesses was a matter for them to pass upon, and not for us or the court below. On the other hand, the evidence on part of the commonwealth warranted that body in finding, not only that the killing was wilful and malicious, but also deliberate.

The other exceptions are of no moment whatever; and we, therefore, pass them without comment.

Judgment affirmed, and it is ordered that the record be returned to the court below for execution.

Alpheus D. Potts's Appeal.

Estate of Daniel Potts, Deceased

Although an advancement must be a present gift, it does not make it any less such gift that it is part, or the whole, of what it may be supposed the donee will inherit on the death of the donor.

The facts that the donor required a judgment note to be given for the sum advanced, and that in his will he bequeathed that note "with accrued interest" to its maker, the recipient of the alleged advancement,—*Held*, to rebut all possible presumption that such present gift as is necessary to constitute an advancement was intended.

(Argued October 4, 1887. Decided October 17, 1887.)

October Term, 1887, No. 40, W. D., before GORDON, Ch. J.,

NOTE.—If some obligation is taken by the decedent for money advanced, the transfer will be considered to have created a debt, and not an advancement. High's Appeal, 21 Pa. 283; Miller's Appeal, 40 Pa. 57, 80 Am. Dec. 555; Lang's Estate, 33 Pittsb. L. J. 9; Bittle v. Bittle, 2 Monaghan (Pa.) 17; Handy's Estate, 167 Pa. 552, 31 Atl. 983, 986; Eisenbrey's Estate, 180 Pa. 125, 36 Atl. 569; Strickler's Estate, 182 Pa. 253, 37 Atl. 999. And such

PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Certiorari to appeal from a decree of the Orphans' Court of Westmoreland County confirming the report of an auditor. Affirmed.

Daniel Potts died June 26, 1884, testate. His will contained the following clause: "To my son, Alpheus D., I give the note which I hold against him, together with the accrued interest."

Letters testamentary were granted to his executors, George W. Bierer and Alpheus D. Potts, son of the testator.

It appeared that Alpheus D. Potts desiring to be educated for the ministry, his father had expended the sum of about $2,000 on his education, the greater portion of which was spent during his minority. The father asked for and received of said Alpheus a note, dated May 28, 1877, for one year, calling for $2,000; at the time of making which Daniel Potts said to one of his daughters, Maggie J. Potts, that Alpheus was giving him, Daniel Potts, the note to show what he had got, so that he would not get any more after his father's death. The consideration of this $2,000 note was the expense formerly incurred by Daniel Potts in the education of his son.

Alpheus D. Potts, as one of the executors of said decedent, filed his account in which, being charged in the inventory with the amount of the said $2,000 note, he claims credit for the same as "not collectible." Exceptions to the allowance thereof having been filed by creditors of decedent's estate, the same was referred to an auditor who disallowed the credit and surcharged the account with the note and interest. To which surcharge the accountant filed, *inter alia,* the following exception: "The auditor erred in surcharging the accountant, A. D. Potts, with $2,000 and the interest thereon, the same being an advancement, and credit claimed in account for same." This exception, with the others, was, after argument, dismissed [2] by the court, and the report confirmed [1]; whereupon, this appeal was taken. Ap-

a transaction may be treated as creating a debt, though no security is given, when it appears that the money was to be accounted for. Levering v. Rittenhouse, 4 Whart. 130. The debt may by consent be changed into an advancement. Sickler's Appeal, 2 Monaghan (Pa.) 23, 17 Atl. 23. But not without. Doty v. Doty, 155 Pa. 285, 26 Atl. 548; Dewees's Estate, 3 Brewst. (Pa.) 314; Frey v. Heydt, 116 Pa. 601, 11 Atl. 535. Except by will, in which case the testator may so direct. Bird's Estate, 2 Pars. Sel. Eq. Cas. 168; Snider v. Snider, 149 Pa. 362, 24 Atl. 284. But the direction should be clear. Strock's Estate. 158 Pa. 355, 27 Atl. 1003.

pellant assigned as error: (1) The confirmation of the report; and (2) the dismissing of the above exception to the auditor's report.

Jno. Armstrong, Marchand & Gaither, for appellant.—The maintaining and education of a child is not deemed an advancement. Lentz v. Hertzog, 4 Whart. 523.

The presumption is that the parent makes these expenditures in the discharge of his parental duties. Riddle's Estate, 19 Pa. 433.

Such education is a parental duty. Miller's Appeal, 40 Pa. 60, 80 Am. Dec. 555.

All there is to warrant the auditor's conclusion that it was the intention of the parties that the moneys expended should be treated as a debt is the note itself. Merkel's Appeal, 89 Pa. 340; Kirby's Appeal, 109 Pa. 41.

As executor, A. D. Potts was bound to account for all the available assets of the estate of his testator, of which he died possessed, and which came into his hands as such. As a debtor he stands in the position of a stranger to the estate of said deceased, just like any other debtor; and if, by reason of insolvency, he is unable to meet his indebtedness, he cannot be surcharged in his account as executor with the amount thereof. The act of February 24, 1834, requires that all the bonds, notes, and other evidences of debt, shall, as far as the same may be known to the executor, be included in the inventory. Bell's Estate, 25 Pa. 95.

Laird & Keenan, Wentling & Miller, I. E. Lauffer, and *D. R. Snyder* for appellees.

PER CURIAM:

After a careful examination of this case, we are obliged to concur in the conclusion arrived at in the court below.

It is altogether inexplicable that if the $2,000 note was intended by the testator as an advancement it should have been put into the form in which we now find it. An advancement is a present gift, and it does not make it any less a gift that it is part, or the whole, of what it may be supposed the donee may inherit on the death of the donor. But if this $2,000 was a present executed gift from Daniel Potts to his son, the appellant, it is re-

markable that for this same sum a judgment note should have been required by the father, and executed by the son. This act rebuts all possible presumption of a present gift, and if, by the testimony adduced on the part of the appellant, doubt is raised as to the intention of Daniel Potts, it is swept away by that clause in his will in which he bequeaths to his son this note "with accrued interest." This shows very conclusively that at the time of the making of that will he regarded this note as a subsisting obligation, and as an interest—bearing asset of his estate.

Decree affirmed, at the costs of the appellant.

Levi Bitting et al., School Board, etc., Plffs. in Err., *v.* Commonwealth of Pennsylvania ex rel. Daniel J. Snyder.

The act of June 25, 1885, regulating the collection of taxes is a general law and is in all respects applicable in the absence of local laws to all portions of the state, and is not rendered local and obnoxious to the Constitution by the fact that various local laws passed prior to 1874 are not only not repealed by it, but are expressly saved from repeal.

(Argued April 28, 1887. Decided October 17, 1887.)

January Term, 1887, No. 82, E. D., before MERCUR, Ch. J., GORDON, TRUNKEY, GREEN, and CLARK, JJ. Error to the Common Pleas of Montgomery County to review a judgment awarding a writ of peremptory mandamus. Affirmed.

The following facts were agreed upon:

First, that said Pennsburg Independent School District was duly erected and established by law;

Second, that said school board, Levi Bitting, president; Samuel Summers, secretary; Charles Bitting, treasurer; Herman Hillegass, Jacob Sechler, and George S. Trumbore, defendants, are the duly elected and qualified school directors of said Independent School District;

Third, that said relator, Daniel J. Snyder, is the duly elected and qualified constable of the township of Upper Hanover aforesaid;

Fourth, that said relator was duly voted for and elected by the

NOTE.—The question involved in this case was fully discussed in Evans v. Phillipi, 117 Pa. 226, 2 Am. St. Rep. 655, 11 Atl. 630.

qualified electors of Upper Hanover township aforesaid, at the spring election held in and for said township on the third Tuesday of February last, as collector of taxes of said township, as provided by law, and was as such duly returned to the court of quarter sessions of said county;

Fifth, that said relator on the 4th day of March, A. D. 1886, took and subscribed an oath of office and filed the same in said court of quarter sessions, and on the same day entered into bonds to the commonwealth in double the probable amount of taxes that will come into his hands, with sufficient sureties approved by said court, and filed the same in the office of the clerk of said court (copies of said oath and bond being hereunto annexed);

Sixth, that said oath and bonds were filed and kept by said clerk in his office with the oaths and bonds of all the other collectors of taxes elected and returned in said county, all being tied together in a separate and exclusive package or file marked on the face "Collectors' Bonds and Oaths of Office for year 1886," which bundle or file is herewith exhibited;

Seventh, that said school board has not issued after legal demand its duplicate of taxes assessed to said relator with its warrants attached directing and authorizing him to collect the same;

Eighth, that the qualified electors of said Independent School District voted for and elected as collector of taxes, in and for said district, one Richard Gilbert, who was duly returned as such to said court of quarter sessions;

Ninth, that said Richard Gilbert did not take and subscribe an oath of office nor enter into bond, and file the same as required by law;

Tenth, that the school tax in said independent district, for the current year, remains uncollected.

J. Wright Apple and *George N. Corson* for plaintiffs in error.

Wm. F. Dannehower for defendant in error.

OPINION BY MR. JUSTICE CLARK:

Upon the statement of facts which has been agreed upon, this case must be affirmed. The only question to be determined is the constitutionality of the act of June 25, 1885, entitled "An Act Regulating the Collection of Taxes in the Several Boroughs and Townships of the Commonwealth."

We have fully considered that question in the case of Evans v. Phillipi, 117 Pa. 226, 2 Am. St. Rep. 655, 11 Atl. 630, brought here on a writ of error from Lancaster county, the opinion in which case we have just filed.

Judgment is affirmed.

Appeal of Ruth and Stoner.

Finding of fact by an auditor appointed to distribute the proceeds of a sheriff's sale is conclusive.

Where two executions were placed in the sheriff's hands at different times, both before sale, and upon the writ first in date he made a special return that he had taken the receipt of the plaintiff in the writ second in date as a prior lien creditor, and upon the writ second in date indorsed as a return "Same return as at No. 151, May Term, 1886," thereby referring to the former writ, while not so clear as might be desired the natural interpretation is that he sold under both writs.

Matters of fact set forth in a sheriff's special return, under the act of April 20, 1846, to a writ of execution, are conclusive, and cannot be impeached, except in a proceeding the object of which is to falsify the return. *So held* where exceptions were filed after the return, and distribution submitted to an auditor.

(Argued October 4, 1887. Decided October 17, 1887.)

October Term, 1887, No. 38, W. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Appeal from a decree of Common Pleas of Westmoreland County dismissing exceptions to a sheriff's special return to a writ of execution, and confirming the report of an auditor awarding the fund raised thereby. Affirmed.

It appeared that the Conemaugh Building & Loan Association, appellee, held two mortgages of the same property made by William McIntyre, each for $400—one dated October 1, 1883, the other dated December 21, 1882, and a bond reciting the last mortgage, dated January 6, 1883.

NOTE.—Parol evidence is not admissible to change the return of the sheriff, unless it is ambiguous, or fraud is alleged. Bogue's Appeal, 83 Pa. 101; Heinbaugh v. Powell, 13 Pa. Co. Ct. 360, 3 Pa. Dist. R. 177; Freeman v. Apple, 99 Pa. 261. It may be offered to explain an ambiguity (Wildasin v. Bare, 171 Pa. 387, 33 Atl. 365), or to show fraud (Evans v. Matson, 51 Pa. 366, 88 Am. Dec. 584).

Subsequently Ruth and Stoner, appellants, obtained judgment against McIntyre for $170.98 and on April 1, 1885, issued execution (No. 151, May term, 1886), by virtue of which the sheriff levied upon the property covered by the above mortgages and by advertisements reciting that writ advertised the property to be sold on May 10, 1886.

On April 28, 1886, appellee entered judgment upon the bond dated January 6, 1883, and issued execution thereon (No. 213, May term, 1886.)

No additional advertisement was made. The sale was postponed to May 15, 1886, when the property was sold to the association for $385.

The attorney for the association testified that he bid, under the impression that the sale was under his writ, and that the price bidden was the full value of the property.

On May 31, 1886, the sheriff made a special return upon the writ of appellants, being the first in date (No. 151, May term, 1886), reciting: "It appearing from the proper record that the said Conemaugh Building & Loan Association as a lien creditor is entitled to receive the sum of $326.81, I have taken his receipt for that amount; and the balance of said purchase money I have ready as commanded."

And to the appellee's writ, he made the following return: "Same return as at No. 151, May term, 1886."

The rules of the court of common pleas of Westmoreland county provide:

Rule No. 162. In all cases where special returns of the sheriff are authorized by law, they shall be read in open court on Saturday morning at 10 o'clock; and the reading thereof shall be noted on the writ and on the minutes of the prothonotary.

Rule No. 163. Upon the reading of a special return the same shall be confirmed *nisi*, which confirmation shall become absolute, unless exceptions be filed within seven days; and if exceptions are filed the case shall be immediately placed on the argument list.

On June 2, 1886, appellants filed exceptions thereto because the sheriff applied any part of the proceeds to appellee's writ; because the liens of appellee's mortgages were not discharged by the sale; and because the sheriff did not collect the whole

purchase money and apply the same to the payment of appellant's writ.

Thereupon the court appointed John Armstrong, Esq., auditor, to report a distribution of the proceeds.

The auditor found the above facts and, *inter alia,* that the sheriff testified that the advertisement was made under appellant's writ and the property could not be sold under appellee's writ on May 10, 1886; that appellee's judgment was for the mortgage debt.

And the auditor further reported as follows:

"That the return of the sheriff is conclusive is one of those elementary principles which cannot be gainsaid or denied. And, therefore, in the present case, the sheriff having made the same return on both fi. fas., it is conclusive and cannot be altered or contradicted by parol testimony. In the case of Mentz v. Hamman, 5 Whart. 150, 34 Am. Dec. 546, it was said: 'Before return made by the sheriff, the courts have always interposed to prevent injustice, but they cannot alter the effect of a return. . . . Nor must we for one moment give countenance to the practice of introducing parol testimony to control the sheriff's return, except in an action against him for official misconduct.'

"And therefore the mortgage of the Conemaugh Building & Loan Association of Blairsville, being the first lien on the real estate sold, is entitled to the fund, less costs of sale and audit.

"The following authorities are referred to as sustaining this decision: Mentz v. Hamman, 5 Whart. 150, 34 Am. Dec. 546; Patton v. Insurance Co. 1 Phila. 396; Sample v. Coulson, 9 Watts & S. 62; Flick v. Troxsell, 7 Watts & S. 65; Warder v. Tainter, 4 Watts, 274."

To this report appellants excepted because the auditor erred in applying the fund and in deciding that the sheriff's return was conclusive upon exceptants.

Thereupon the court dismissed the exceptions and confirmed the report; and appellants took this appeal, assigning as error that the court erred in dismissing the exceptions and in refusing to sustain them.

McAfee, Atkinson, & Peoples, for appellants.—Sale under a junior judgment will not discharge a prior mortgage lien. Com. v. Wilson, 34 Pa. 63; Cross v. Stahlman, 43 Pa. 129; Kuhn's Appeal, 2 Pa. St. 264; Wertz's Appeal, 65 Pa. 306.

Appellee's bond was dated January 6, 1883, the mortgage December 21, 1882; and there was no evidence to show that they were for the same debt. If they were not for the same debt, appellee's judgment was a subsequent lien.

There was no evidence that appellee produced to the sheriff a certified statement showing his lien as required by the act of April 20, 1846. Franklin Twp. v. Osler, 91 Pa. 160.

The property was not, and could not have been, advertised under appellee's writ.

If a sheriff's special return under act of April 20, 1846, is conclusive, a creditor aggrieved thereby has no remedy.

Section 2 expressly provides that if the return shall be questioned or disputed the court shall appoint an auditor who shall make report distributing the proceeds; or to direct an issue to determine the validity of said lien.

The rules of court (Nos. 162 and 163) provide for reading the return in court, and that thereupon the same shall be confirmed *nisi;* and if exceptions are filed they shall be placed on the argument list.

These provisions contemplate a contest upon the return; otherwise, there was nothing to refer to the auditor.

A sheriff's return may be disproved by evidence *aliunde.* Hyskill v. Givin, 7 Serg. & R. 369; Lowry v. Coulter, 9 Pa. 349; Vandike's Appeal, 17 Pa. 271.

A sheriff's special return is only prima facie in favor of the purchaser; and any averment therein may be negatived by showing the purchaser not entitled to the benefits of the act of April 20, 1846.

James S. Beacom, for appellee.—The argument of appellants relating to the lien of appellee's judgment and as to whether the proper certificate of lien was furnished the sheriff are questions of fact found by the auditor. The finding of an auditor upon the facts, which has been approved by the court below, will not be disturbed on appeal, except for flagrant error. Burrough's Appeal, 26 Pa. 264; Bedell's Appeal, 87 Pa. 510; McConnell's Appeal, 97 Pa. 31.

The fact that the price bid was the full value of the property is evidence of the understanding of the parties. There would be ground for setting aside the sale if the fund was not awarded to appellee. There is no dispute as to the legal effect of the re-

turns; the effort is to show erroneous application of the fund. This cannot be done, except in an action against the sheriff.

In addition to the cases cited by the auditor in his report, the following are cited here: McMicken v. Com. 58 Pa. 213; Welsh v. Bell, 32 Pa. 12; Trigg v. Lewis, 3 Litt. (Ky.) 129; Stewart v. Stocker, 13 Serg. & R. 199, 15 Am. Dec. 589; Perrin v. Leverett, 13 Mass. 128; Evans v. Parker, 20 Wend. 622.

OPINION BY MR. JUSTICE GREEN:

The auditor appointed to make distribution, in this case, found as a fact that the judgment of the Conemaugh Building & Loan Association was entered for the debt secured by the mortgage. The execution issued upon this judgment was delivered to the sheriff, after the writ of the appellants came to his hands, but before the sale.

The sheriff, having both writs in his hands at the same time, made return to the writ of the appellants that he had levied and sold the real estate of the defendant in the execution in obedience to and by virtue of that writ, and to the writ of the building and loan association he returned, "same return as at No. 151, May term, 1886." Whether he meant by this to say that he had levied and sold under the writ of the association also is perhaps not quite so clear as might be desired, but the natural interpretation of his words is to that effect; for the "same return" written out in full would, with reference to that writ, mean the same thing as the return upon the other writ meant in the reference to it.

This conclusion is strengthened by the circumstance that in the fully written out return the sheriff certified that as it appeared from the proper record that the association as a lien creditor was entitled to the sum of $326.81 he had taken its receipt for that amount. As this return would only be consistent with the fact that he had sold the property under both writs we are obliged to assume such to be the fact. Of course, if the sale was made upon both writs the lien of the mortgage, for the debt secured by which the judgment was entered, would be devested by the sale.

As to the matters of fact set forth therein, the sheriff's return is, of course, conclusive, and cannot be impeached, except in a proceeding the object of which is to falsify the return.

The auditor appointed to distribute the money has found the

facts to be as above stated, and, in accordance with them, the distribution was properly made.

Decree affirmed and appeal dismissed, at the costs of the appellant.

John Alexander, Appt., *v.* John Moody et al.

In a suit for specific performance of a contract to convey land, where the averment that the purchase money had been fully paid is denied, and a receipt is exhibited acknowledging that $2,000 had been received from a third party on the contract, and that in consideration of this advance by such third party the defendant is to convey the land to the plaintiff's decedent, "and he to execute a judgment bond to her (such third party) for the amount, secured by mortgage on same property," such third party is a necessary party to the bill, that she may have an opportunity of proving that the decedent was a party to and acquiesced in the arrangement, and thereupon the court should decree that before the conveyance is made to plaintiffs, or simultaneously therewith, the sum advanced to her should be secured on the premises.

A written expression of opinion by the defendant as to the construction of an agreement in writing ought not to control the meaning of the language employed therein. Where an agreement for the sale of land, properly construed, excepts the coal, the erroneous opinion or supposition of either of the parties cannot alter it. An exception and reservation of certain timber on the land described, also all oil or gas in or under the same "with free mining privileges of all kinds, right of way for roads of all kinds, also free ingress and egress over, into, upon, and under said lands in all parts thereof at all times," embraces coal and other mineral substances in the reservation.

(Argued October 8, 1887. Decided October 24, 1887.)

October Term, 1887, No. 165, W. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Appeal from a decree of the Jefferson County Common Pleas in favor of plaintiffs in a suit for the specific performance of a contract for the conveyance of land. Reversed.

The bill sets forth: (1) That on September 28, 1875, defendant sold to John Moody part of a tract of land in Snyder township, Jefferson county (setting out the agreement); (2) that on July 1, 1879, defendant sold to John Moody other land in the same township (setting out the agreement); (3) that

Cited in Moody v. Alexander, 145 Pa. 571, 579, 23 Atl. 161, in which the contract in question was again adjudicated.

John Moody in his lifetime had paid defendant the full consideration, and had performed all covenants on his part; (4) that John Moody was dead, and that the plaintiffs were his heirs and legal representatives; (5) that they had made application to defendant for performance on his part, and demanding conveyance of the land; and praying a decree for specific performance.

John Alexander, the defendant, in his answers to plaintiffs' bill, submitted to the court that Rebecca Brown, a widow, resident in Philadelphia, is a necessary party to the bill; that the said Rebecca Brown is a sister of John Moody, deceased, and at his request advanced the sum of $2,000 with which that much of the purchase money mentioned in the agreement set forth in the bill was paid, under an agreement that this should be secured by a judgment bond and mortgage on the property, giving her $140 per annum for life, payable semi-annually, and so that at her death the principal may, if she so directs by her will or otherwise, become extinguished for the benefit of her brother or his heirs; that the third paragraph of the bill is untrue, inasmuch as $2,000 of the purchase money had not been paid, and will not have been paid in satisfaction of so much of the purchase money agreed to be paid on that contract, until there shall have been delivered to Rebecca Brown a mortgage on the property and a judgment bond of the owners thereof, securing to her the payment of $140 annually during her lifetime. Defendant annexed a copy of the receipt given her for the sum of $2,000, which shows the terms on which it was paid, and averred that defendant had paid her for the annuity the following sums, which are due him from the representatives of John Moody: January 6, 1881, $280, to December 4, 1881; November 4, 1882, $140, to December 4, 1882; November 9, 1883, $140, in full to December 4, 1883; August 5, 1884, $140, in full to December 4, 1884.

(Copy Receipt.)

Philadelphia, Dec. 4, 1879.

Received of John Moody by the hands of Rebecca Brown $2,000, being on account of his contract with me dated July 1, 1879, by which I have sold to him 114 4/10 acres of land, being part of tract No. 130 in Snyder township, Jefferson county, Pennsylvania, in consideration of which payment I am to

make conveyance to him of said tract, and he to execute a judgment bond to her for the amount secured by mortgage on same property. Interest to be paid semi-annually.

(Signed) John Alexander.

The answer further averred that defendant had always been ready and willing to make such a conveyance as was required by the contracts, and that he did have such a conveyance prepared and executed, and tendered the same to the plaintiffs, on the 10th day of December, 1883, together with any balance due them on accounts between them, but they refused to accept the same.

The agreement of September 28, 1875, stated that Alexander "reserves all minerals and underground deposits of all kinds and descriptions, and all timber (except that herein specially granted for use on the premises), including free mining privileges," etc.

The agreement of July 1, 1879, stated that Alexander reserves "all such timber upon said land as he may wish to use or manufacture; also all oil and gas in or under the said land, with free mining privileges of all kinds, right of way for roads of all kinds; also free ingress and egress over, into, upon, and under said lands, any and all parts thereof at all times; . . . and for all land temporarily taken for mining and for damages incurred by entering upon and using said land in mining operations, said Moody shall be entitled to receive reasonable compensation from the party inflicting or causing such damage."

Defendant executed a deed dated November 9, 1883, and claimed to have tendered it in compliance with the agreements.

This deed first described the land referred to in the agreement of July 1, 1879, and as to that contained the following:

"Excepting and reserving to the party of the first part, his heirs and assigns, out of and from the premises first above described, all timber growing upon the said premises that he, the said party of the first part, his heirs or assigns, may require for use or manufacture, with the right of ingress and egress at all times hereafter for cutting and carrying away the same. And excepting and reserving all oil, gas, and mineral substances in, under, or upon the said premises, and the right of entering in and upon the lands for the purpose of mining or otherwise winning and obtaining the said oil, gas, and mineral substances by mining or other usual and customary processes," etc.

The said deed described, secondly, the land referred to in the agreement of September 28, 1875, and as to that contained the following:

"Excepting and reserving to the party of the first part, his heirs and assigns, all gas, oil, coal, ores, and other minerals or mineral deposits in, under, or upon the said premises; and also all timber growing upon the same, together with the right to construct convenient roads and ways over or under the same, and the right of ingress and egress for searching for and winning and removing the coal, timber, and other substances excepted and reserved," etc.

The master who heard the case reported that Rebecca Brown need not be made a party and that it was not requisite that a bond and mortgage for $2,000 be given her as part of the purchase money, as claimed by defendant. He also reported that the deed of November 9, 1883, complied fully with the agreement of September 28, 1875, but that the reservation in the deed of "all mineral substances" was not warranted by, and was not a compliance with, the agreement of July 1, 1879. He based this construction of the instruments mainly upon a letter of the defendant to one of the plaintiffs, set out in the opinion of the supreme court in reference to his omission to reserve coal in the agreement. The master accordingly recommended a decree entitling the plaintiffs to a specific performance of the agreement of July 1, 1879, and submitted form of deeds following the wording of the agreements, and imposed the costs upon the defendant.

Exceptions to the master's report were overruled and a decree was entered in conformity therewith, and plaintiff appealed.

R. C. McMurtrie and *Alexander C. White* for appellant.

E. H. Clark and *Charles Corbet* for appellees.

Opinion by Mr. Justice Sterrett:

One of the questions suggested by the record is whether Mrs. Rebecca Brown should not have been made a party to the bill, so that her right to a mortgage simultaneously with the conveyance, securing $2,000 purchase money, advanced by her in December, 1879, might have been considered and decided.

In the third paragraph of the bill it is averred that the pur-

chase money has been fully paid; but this is denied in the answer, wherein appellant says Mrs. Brown, a sister of John Moody, deceased, at his request advanced $2,000, with which that much of the purchase money was paid, under an agreement that the same shall be secured by a judgment bond and mortgage on the property, etc., and refers to the receipt given when she paid the money.

That paper, after acknowledging the receipt of the $2,000 from Mrs. Brown on account of Moody's contract of July 1, 1879, for purchase of the land therein described, provides that, in consideration of the sum thus advanced by Mrs. Brown for Moody, appellant is to convey the land to him "and he to execute a judgment bond to her for the amount, secured by mortgage on same property."

As to the $2,000 above referred to, it is not even alleged by appellees that it was paid in any other way; and, if they claim the benefit of it as a payment on account of the purchase money, they cannot in equity and good conscience repudiate the terms on which it was advanced by Mrs. Brown. She is at least entitled to an opportunity of proving the allegations contained in appellant's answer, and that her brother was a party to or acquiesced in the arrangement. If she succeeds in doing so, the court should decree that before the conveyance is made to appellees, or simultaneously therewith, the sum advanced by her should be secured on the premises.

Another subject of contention is the true construction of the clause, in the agreement of July 1, 1879, excepting and reserving certain timber upon the land therein described, also all oil and gas in or under the same, "with free mining privileges of all kinds, right of way for roads of all kinds, also free ingress and egress over, into, upon, and under said lands, any and all parts thereof at all times," together with other rights and privileges therein specified.

It is claimed by appellant that the language of a conveyance, executing the contract, should be such as to carry out its true intent and meaning, in forms of expression usual in approved conveyancing, and not in the very words of the contract. He accordingly executed and tendered a deed, embodying the exceptions and reservations referred to, expressed in due form, and, as he contends, carrying out the true intent and meaning of the executory contract.

Construing the contract, without the aid of evidence *dehors* the instrument, we think his position to have been the view entertained by the learned master until he discovered what he regarded as the key to the proper construction of the agreement, *viz.*, the expression contained in appellant's letter of September 29, 1883, in which he says:

"I want you to tell me by return mail what your family has to say to my offer to give them $100 in lieu of my omission to reserve the coal in the bottom lands. As a matter of fact my omitting the reserve can be of no possible good to your family, but I prefer to have all my titles alike and it may at some time be an advantage to me; and so I propose to give them $100, and hope it will be satisfactory to all of them."

This letter was addressed to one of the appellees after the decease of his father; and the master regarded it as conclusive evidence that the phrase, "with free mining privileges of all kinds," and other expressions contained in the excepting and reserving clause of the agreement, was not intended to embrace coal and other mineral substances. In this he was mistaken. What was said by appellant in the letter referred to was merely an expression of opinion as to the construction of the agreement, and ought not to control the meaning of the language employed therein.

In their bill plaintiffs below pray specific execution of the contract as written. There is no allegation or even a suggestion in the pleading that the language of the contract does not convey the real intention of the parties. If the agreement properly construed excepts the coal, surely the erroneous opinion or supposition of either of the parties cannot alter it. We are, therefore, of opinion that the learned court also erred in decreeing specific performance of the contract "with the reservations and conditions provided for in said contract, as interpreted by the master's report."

In view of all the circumstances, the costs should not have been imposed wholly on appellant. As the case now presents itself on the evidence before us, an equal division of the costs would have been more just and equitable. But, inasmuch as the case goes back for further proceedings, it may assume a different phase when a final decree is reached; and hence it is unnecessary to express any opinion upon the subject that might be

regarded as interfering with the sound discretion of the court below in finally passing on the question of costs.

Decree reversed at the costs of the appellees, and record remitted, with instructions to proceed in accordance with the foregoing opinion.

American Central Insurance Company, Plff. in Err., v. A. J. Haws.

In a policy of insurance against lightning, where the live stock insured are described as contained in a certain barn, the fact that an animal insured was not present in the barn at the moment of its death by lightning, but was in an adjoining field, does not impair the right of recovery. Haws v. Fire Asso. 114 Pa. 431, 7 Atl. 159.

Alias and pluries writs are a continuance of the original process, and not the inception of a fresh suit. A suit is properly commenced within the prescribed time where the writ is issued within that time, although not served, provided an alias and pluries writ was issued so that the proper service was finally obtained.

Where a loss under an insurance policy was total, there being but a single subject of insurance, which was entirely destroyed, and immediate notice of the loss was given to the defendant, a further detailed proof of loss is not requisite to a right of recovery.

Where the insured made a bona fide effort to give notice and make out proofs of loss, and applied to the insurance agent for blanks for that purpose, and the latter had none on hand but sent to the company for them, and when they were received a full proof was made out and signed and sent to the company, which received it without objection after the time prescribed in the policy, the court properly left the question to the jury whether there was a reasonable explanation of the delay; and the jury having found that there was,—*Held*, no error.

(Argued October 13, 1887. Decided October 24, 1887.)

October Term, 1887, No. 221, W. D. Error to the Common

Cited in Haws v. St. Paul F. & M. Ins. Co. 130 Pa. 113, 118, 2 L. R. A. 52, 15 Atl. 915, 18 Atl. 621, and in Powell v. Agricultural Ins. Co. 2 Pa. Super. Ct. 151, 158, 38 W. N. C. 469, as to the questions involving insurance; and in First Nat. Bank v. Cooke, 3 Pa. Super. Ct. 279, 281, 39 W. N. C. 531, as to the service of alias writs.

NOTE.—The main question involved in this case was decided in Haws v. Fire Asso. 114 Pa. 431, 7 Atl. 159, and distinguished in Haws v. St. Paul F. & M. Ins. Co. 130 Pa. 113, 2 L. R. A. 52, 15 Atl. 915, 18 Atl. 621, where the policy provided for exemption from liability where the animal was killed while removed from the building. See also Reck v. Hatboro Mut. Live Stock & P. Ins. Co. 163 Pa. 443, 30 Atl. 205.

Pleas of Mercer County to review a judgment in favor of plaintiff in an action upon a policy of insurance, for the value of a mare killed by lightning. Affirmed.

The policy was, in part, as follows:

In consideration of thirty-five and sixty-six and two-third one hundredth dollars, and of the terms and conditions herein contained, the American Central Insurance Company hereby insures A. J. Haws, of Johnstown, Pa., for one year from the 1st day of March, 1884, at 12 o'clock at noon, to the 1st day of March, 1885, at 12 o'clock at noon, to an amount not exceeding thirty-five hundred and sixty-six and two-third dollars, against loss or damage by fire to the following specified property only, and while located as described herein and not elsewhere, to wit: . . . $133\frac{1}{3}$ on black mare, Fannie H, . . . all contained in his new two-story frame barn, situate on his farm in Hempfield township, Mercer county, Pa., about 1 mile east of Greenville. $7,133\frac{1}{3}$ concurrent insurance. And the said American Central Insurance Company hereby agrees to indemnify and make good unto the said assured all such immediate loss or damage, not exceeding in amount the sum or sums insured as above specified nor the interest of the assured in the property, as shall happen by fire to the property so situated and specified. . . .

2. This policy shall be void and of no effect, . . . if the property insured be removed to any other building or location than that described herein; . . .

The policy provided that proof of loss should be made within thirty days after loss, and that any suit under the policy should be brought within twelve months after loss.

The following "lightning indemnity clause" was attached to the policy:

It is hereby specially agreed that this policy shall cover loss or damage by lightning (meaning thereby the commonly accepted use of the term "lightning," and not in any case to include loss or damage by wind, or electrical storms), to the property hereby insured, not exceeding the sum insured nor the interest of the assured in the property whether fire ensues or not; and provided, that if there is other insurance upon the property damaged, then this company shall only be liable for such proportion

of the loss or damage as the sum hereby insured bears to the whole amount of insurance thereon, whether such other insurance contains a similar provision or not.

This action was brought to recover for the loss of the mare "Fannie H," alleged to have been killed by lightning, on or about June 9, 1884. Summons was issued May 23, 1885, and service set aside by the court January 7, 1886; alias issued January 13, 1886, which was returned without service, and pluries issued January 3, 1887, which was served January 15, 1887.

On March 30, 1887, defendant filed the following special plea:

Defendant pleads that this action was not commenced within twelve months next after the loss occurred. That the lapse of time after the loss and before the action was commenced shall be taken as conclusive evidence against the validity of plaintiff's claim, according to the terms of the policy.

S. F. Thompson,
Attorney for Defendant.

This plea was overruled by the court. (First assignment of error.)

On the trial plaintiff offered in evidence proof of loss, by lightning, of black mare, Fannie H, mentioned in the policy, amount, $133.33\frac{1}{3}$.

Sworn to and subscribed by A. J. Haws, the claimant, before E. P. Gillespie, a notary public, on August 14, 1884. Indorsed "Loss No. 5,956, American Central Insurance Co. Statement of loss. Assured, A. J. Haws, Greenville, Pa., agency."

Defendant objected to the above offer for the reason that said proof of loss was not executed until August 14, 1884, and the evidence already offered showed that this loss occurred on or about June 9, 1884, and that the policy required that plaintiff should within thirty days after loss render this company a particular account of said loss, under oath, stating the other circumstances, if any, and giving copies of the written portion of all policies, which was not done in this case.

By the Court: The proof of loss offered in evidence is received, the objection is overruled and an exception is given to the defendant. (Second assignment of error.)

Further facts appear from the following charge of the court below:

"It seems that the plaintiff, A. J. Haws, insured certain horses with several companies, and, among others, with the American Central Insurance Company, the defendant in this case, and that this insurance was in existence in June of 1884. Among the horses that were insured in this policy by the defendant company was one brood mare called 'Fannie H.' It also seems that about the 9th of June of 1884 this mare was found dead in a field on the plaintiff's farm adjoining the barn mentioned in the policy. The policy not only insured the mare against loss by fire, but it also insured the plaintiff against loss of the mare by lightning.

"The testimony adduced on behalf of the plaintiff is to the effect that the witnesses who were upon the stand saw this mare out in the field about the middle of the forenoon of the 9th or 10th day of June of 1884. One of the witnesses testifies that there was a streak along the back of the mare as though the hair had been singed. It seems that there were two other animals killed or lying dead there at the same time, which seem to have been killed at the same time with this mare, 'Fannie H.' One was a mare and the other a colt, and the mare had fallen on the colt, both dead. It is also testified by these witnesses that on the night preceding this finding of these animals there had been a severe thunder storm, with lightning. The plaintiff asks you to infer from this that the mare Fannie H. was killed by lightning; and it is for you to say whether you are satisfied by the weight of the evidence that this was the cause of her death.

"The defendant has not adduced any testimony or evidence in its own behalf, but relies upon the testimony adduced on behalf of the plaintiff.

"Now, if you believe that this mare was found dead on the morning of the 9th or 10th of June, and believe that the circumstances surrounding her at that time, and the circumstances which preceded the finding of her death, point with reasonable certainty to the fact that she was killed by lightning, you would be warranted in so finding, although you did not have the testimony of any witness that saw the mare killed. If the testimony satisfies you that this is a reasonable hypothesis, it would warrant you in finding that fact, although it is only shown by

circumstances, and not by what is commonly called direct proof. It is for you to say whether the weight of the evidence satisfies you that this was the cause of the death of the mare, Fannie H. If you are so satisfied, then your verdict should be in favor of the plaintiff.

"The amount of the plaintiff's claim is one third of $400. The value placed upon this mare at the time of the insurance was $400. It seems that she was insured in two other companies for an amount equal with that included in this policy; and under the provisions of the policy each company would bear an equal proportion of the loss, or $133.33⅓. Your verdict, then, if you find for the plaintiff, under the evidence, which is to the effect that the mare was actually worth at least $400 at the time, which is not controverted, if you believe that evidence, then your verdict would be for $133.33⅓, together with interest from sixty days after the time when the proof of loss was received at the office of the company.

"The proof of loss in this case has been given in evidence. The date of the proof of loss is the 14th of August, 1884. There is an indorsement on the back of it, 'Received at St. Louis 9–5–84.' It is admitted that this proof of loss was delivered by the defendant to the plaintiff to-day; that it has been derived from their custody and brought into evidence in this suit. If you believe, then, that this indorsement was made by the late custodians, and sanctioned by them through their retaining it without objection to this indorsement, you would be warranted in finding from that that the proof of loss was received by them on the 5th day of September, 1884; and you would compute interest from sixty days after that date. That would be November 5, 1884.

"The defendant has asked for instructions upon the following points:

" '1. That the policy under which the plaintiff claims covered only such property as was contained in his "new two-story frame barn," and that defendant is not liable for any loss of property not contained in said building at the time of the loss.'

"*Ans.* This point is refused. It is covered by the decision of the supreme court in the case of Fire Insurance Company of Philadelphia v. Haws. (Third assignment of error.)

" '2. That if the jury find that the mare was killed by lightning on or about June 9, 1884, and that the summons in this

suit was not served on the resident agent of the defendant company until January 15, 1887, the plaintiff cannot recover.'

"*Ans.* It seems by the record in this case that the summons was originally issued on the 23d day of May, 1885. This was less than a year after the time the loss occurred, and notwithstanding the provision in the policy requiring that suit shall be brought within a year, the plaintiff has complied with that provision of the policy in bringing his suit, in view of what followed the issuing of this summons. It appears that the summons was served upon someone who turned out not to be the agent of the company then, and that the company came in and complained that service had not been made upon it or upon its authorized agent, and suggested that one Mr. Lundy, of Williamsport, I believe, was its authorized agent. It seems from the record and return of the sheriff that this summons was sent to be served upon this Mr. Lundy, and that the sheriff returned that Mr. Lundy was not then the agent of the company, and suggested some other person who was, and finally service was had upon this person then suggested by the sheriff of Lycoming county. In view of this state of facts this request is refused. (Fourth assignment of error.)

" '3. If the jury find that the mare was killed by lightning during an electrical storm, the plaintiff cannot recover under this policy.'

"*Ans.* If you find that this mare was killed by lightning you need not inquire the kind of a storm that was taking place at the time. If it was killed by lightning, that is all that is required to fix the liability of the company so far as the manner of death is concerned. (Fifth assignment of error.)

" '4. If the jury find that the mare was killed on or about June 9, 1884, and that proof of loss was not executed until August 14, 1884, and was not forwarded to the defendant until September 5, 1884, the plaintiff cannot recover.'

"*Ans.* The policy upon which the plaintiff has declared requires that proof of loss shall be made within thirty days from the time of the loss. The plaintiff is bound to comply with that provision, unless he gives a reasonable explanation for not doing so. This provision of the policy is made for the protection of the company, so that it may have all opportunity to examine the property when destroyed and see whether or not the loss is a bona fide loss, or whether it has a just and proper excuse for

not paying the amount that is claimed of it. In the case now before us the testimony is that Mr. Pettit was the agent who issued the policy, or through whom the policy was obtained, the resident agent at Greenville. Mr. Pettit testifies that on the morning after the loss he was visited by someone from Mr. Haws's farm and was informed of the loss of this property; that he did not then go out, but that he afterwards went out with one Mr. McCandles, who came there to adjust the loss for, perhaps, the American Fire Insurance Company; that Mr. Haws himself was not at home at this time, but he came home in the course of a few days and came into Mr. Pettit's office; that Mr. Pettit then did not have any blanks of the company. He says that the company usually sent him blanks for proof of loss; that he wrote to the company, and that he received the blanks; that Mr. Haws made out the proof of loss, and that it was sent to the company. Mr. Haws testifies that he went there for the purpose of getting the proof of loss made out, and that there were no blanks then in possession of the agent; that he, the agent, sent for proofs of loss and in course of time they came, and that he made out the proof of loss as soon as the blanks were received.

"Now, if you find that this is a reasonable explanation for the delay beyond thirty days, the fact that this was delayed beyond thirty days would not defeat the plaintiff's right to recover. But, on the other hand, if you do not believe that this is a reasonable explanation of the delay, you should find in favor of the defendant, because it is one of the stipulations of the policy that it shall be made within thirty days. It is left to you as a question of fact to say how this was, with the further qualification that if you believe that the company received this proof of loss without objection, then you can say whether or not it waived any objection to the delay on account of the proof of loss. If you find that it waived that objection, then you should not defeat the plaintiff's right to recover, upon the ground of this delay, if he is entitled upon the other essential matters to recover. (Sixth assignment of error.)

"Now, I believe that that covers the legal propositions in this case. You will, then, take the case, and you will inquire, first whether or not this horse was killed by lightning. Then, if you find that in favor of the plaintiff, you will inquire further whether or not the plaintiff made out this proof of loss, within

a reasonable time after the loss occurred, and sent it to the company with due diligence. The indorsement upon the proof of loss is that it was received on the 5th of September, 1884. The date of the proof of loss is the 14th of August, 1884. I do not know of any evidence in the case as to when it was mailed, further than the testimony of Mr. Haws that he made it as soon as it was received and left it with Mr. Pettit, who was the resident agent of the company. I do not remember what Mr. Pettit's testimony was, as to the time that he received the proof of loss. I think he stated that he sent for them, perhaps, at the time Mr. Haws made the request, and that he received them shortly afterwards. If there is a conflict of testimony between these parties, it is for you to say where the truth is, and to find whether or not this was done with due diligence by Mr. Haws. If it was, then the plaintiff is entitled to recover; otherwise, the defendant would be entitled to recover for this breach of the contract, even though the plaintiff would be entitled upon the rest of it."

The jury rendered a verdict in favor of plaintiff for $152.53, upon which judgment was entered, and defendant took this writ. The assignments of error specified: (1) The overruling of the special plea; (2) the admission of the proof of loss in evidence; and (3–6) the answers to the points.

S. F. Thompson and *T. Redmond,* for plaintiff in error.—The court admitted the proof of loss in evidence under objection, and left it to the jury to say whether or not the company had waived the requirement of the policy as to proof of loss within thirty days.

There was no evidence before the jury from which they could find a waiver by the company, for nothing but an express agreement with the company would be sufficient for that purpose. Beatty v. Lycoming County Mut. Ins. Co. 66 Pa. 9, 5 Am. Rep. 318; Diehl v. Adams County Mut. Ins. Co. 58 Pa. 452, 98 Am. Dec. 302.

The limitation of twelve months within which suit should have been commenced in case of loss is binding upon the parties. Northwestern Ins. Co. v. Phœnix Oil & Candle Co. 31 Pa. 448.

Was this suit commenced within twelve months next after the loss occurred, as contemplated by the parties to this contract?

It is true a summons had been issued, likewise an alias summons; but neither was served upon the resident agent of the company, the only party to accept service of process under the laws of this state. Did not the action commence on the date of service of the pluries summons on the resident agent, to wit, January 15, 1887? Wilson v. Ætna Ins. Co. 27 Vt. 99.

E. P. Gillespie and *S. Griffith & Son*, for defendant in error. —The court was right in overruling the special plea filed. Lynn v. M'Millen, 3 Penr. & W. 170; Magaw v. Clark, 6 Watts, 528; McClurg v. Fryer, 15 Pa. 293.

There was sufficient evidence to submit to the jury as to a waiver of the stipulation that proof of loss should be furnished within thirty days. The question was properly submitted to them and it was their province to decide it.

The judgment below should be affirmed. Lycoming County Mut. Ins. Co. v. Schollenberger, 44 Pa. 259; Wood, Ins. old ed. § 395; May, Ins. 143.

OPINION BY MR. JUSTICE GREEN:

In the case of Haws v. Fire Asso. 114 Pa. 431, 7 Atl. 159, we decided the main question involved in the present case. We held that the fact that the animal was not present in the barn at the moment of death by lightning did not impair the right of recovery; and the learned court below, following our ruling in that case, refused the first point of the defendant, and in that there was no error.

It is quite clear that the defendant's special plea cannot be sustained. An action was commenced within twelve months next after the loss occurred; and although the writ was not served, an alias and pluries writ was issued, so that a proper service was finally obtained. We have always held that alias and pluries writs are a continuance of the original process, and not the inception of a fresh suit. Lynn v. M'Millen, 3 Penr. & W. 170; McClurg v. Fryer, 15 Pa. 293.

As to the proof of loss, it must be borne in mind that the loss was total, there being but a single subject of insurance, which was entirely destroyed, and that immediate notice of the loss was given to the defendant. In such circumstances we have repeatedly held that a further detailed proof of loss was not requisite to a right of recovery. Lycoming County Mut. Ins.

Co. v. Schollenberger, 44 Pa. 259; Farmers' Mut. F. Ins. Co. v. Moyer, 97 Pa. 441; Pennsylvania F. Ins. Co. v. Dougherty, 102 Pa. 568; Susquehanna Mut. F. Ins. Co. v. Cusick, 109 Pa. 157.

The learned court below left to the jury the question whether there was a reasonable explanation of the delay beyond thirty days, in consequence of certain facts which occurred in relation to making out the proofs of loss, and the jury found that there was, and this was quite as much as the defendant was entitled to ask for in view of the character of the facts referred to. They constituted a bona fide effort on the part of the plaintiff, not only to give notice of the loss, which he did very promptly, but also to make out the full written proofs. When he applied to the agent for that purpose the latter had none on hand but sent to the company for them. When they were received a full proof was made out and signed and sent to the company who received it without objection. We see no error in the action of the court upon this subject.

Judgment affirmed.

Albert A. Fisk, Plff. in Err., *v.* Equitable Aid Union.

Where, by the terms of a certificate of life insurance issued by a mutual benefit association, the whole amount being payable to a single beneficiary, the member is empowered to change the designation of the beneficiary upon the presentation of the certificate, together with a new application, to an officer of the association, and the member surrenders such certificate and obtains a new one, containing the names of new beneficiaries in addition to the original beneficiary, and giving the latter a share, instead of the whole, of the amount insured, such new certificate becomes a substitute for the first and the rights of the original beneficiary are controlled thereby; and this is so although the original certificate was delivered to such beneficiary, and the change was made without his knowledge or consent, and he paid the dues up to the member's death.

(Argued October 10, 1887. Decided October 24, 1887.)

October Term, 1887, No. 15, W. D. Error to the Court of

Cited in Hamilton v. Royal Arcanum, 189 Pa. 273, 275, 42 Atl. 186.

NOTE.—The beneficiary named in the certificate may be changed upon compliance with the requirements of the by-laws. Jinks v. Banner Lodge, No. 484, 139 Pa. 414, 21 Atl. 4; Beatty's Appeal, 122 Pa. 428, 15 Atl. 861; Hamilton v. Royal Arcanum, 189 Pa. 273, 42 Atl. 186. And the existing

Common Pleas of Mercer County to review a judgment in favor of defendant in an action of debt on an insurance certificate, issued by a mutual benefit association. Affirmed.

The original certificate on which this suit is brought was for $1,175, payable to Albert A. Fisk, the plaintiff, husband of the member to whom the certificate was issued. The second certificate, referred to hereafter, was for $1,175, payable as follows: To Albert A. Fisk, the husband, $375; to Mary Fisk, the member's mother, $300; to three sons of the member, $300, $100, and $100, respectively.

Said Mary Fisk, and A. H. McElrath, the guardian of the infant children of the member, mentioned in the second certificate, were brought into the suit as interpleaders.

The facts of the case are sufficiently set forth in the charge of the court below, MEHARD, P. J., which was as follows:

"The plaintiff, A. A. Fisk, has brought suit against the defendant, the Equitable Aid Union, to recover the amount of an insurance certificate that was issued upon the application of Hattie R. Fisk in the fall of 1881.

"It appears by the evidence of the plaintiff, which is not disputed, that Hattie R. Fisk was a member of an association called the Mutual Aid Union, now called that, but at that time, perhaps, called by some other name. This was in the fall of 1881. In pursuance of her rights as such member she made an application for an insurance upon her life, and designated in that application A. A. Fisk, the plaintiff, as the beneficiary or the person to whom the insurance should be paid upon the happening of her death.

"It is also in evidence that she or A. A. Fisk paid the dues required by the company upon that policy, so that the company has received from the plaintiff, or upon this policy, all that it could ask.

"Moreover, it has appeared in evidence that Hattie R. Fisk

right to make such change cannot be taken away by subsequent by-laws. DeGrote v. DeGrote, 175 Pa. 50, 34 Atl. 312.

As to change of beneficiary, see the following editorial notes presenting the authorities on their respective subjects: Changing designation in benefit certificate otherwise than in prescribed method, note to Grand Lodge, A. O. U. W. v. Noll, 15 L. R. A. 350; power of insured to destroy rights of beneficiary, note to Union Cent. L. Ins. Co. v. Buxer, 49 L. R. A. 737.

died on the 3d day of October, I think, of 1885, and that due proof of her death was made.

"This established a prima facie case in favor of the plaintiff. In other words, the plaintiff would be entitled to your verdict for the amount of that policy, $1,175, with interest from ninety days after the death of Hattie R. Fisk, unless the defendant has succeeded in showing a valid defense to the plaintiff's demand.

"The defendant sets up, as a defense to this claim, that, according to the policy as originally issued, and according to the by-laws of the company, which were a part of the original contract, it was left in the power of Hattie R. Fisk to change the beneficiary in this insurance policy or certificate; that in pursuance of such discretion Hattie R. Fisk made an application, in accordance with the rules and by-laws of the company, asking that the original certificate be canceled, and surrendering it in point of fact to the company, and asking that a new certificate be issued in favor of other beneficiaries than the plaintiff.

"The evidence that has been adduced in behalf of the plaintiff, to the effect that he paid the dues upon the original policy, or all of the dues upon either policy during the lifetime of Hattie R. Fisk, is relevant, as showing a compliance upon her part with her part of the contract; but it does not create any right in the plaintiff which he would not have under the policy itself. The policy is the creation and the limit of the plaintiff's right in this case, and if his right under that policy has been disannulled, then he would not have any right or claim against the defendant because of his having paid these dues.

"So far as the plaintiff's case is concerned, there is no dispute as to the facts.

"So far as the defendant's case is concerned, it is incumbent upon you to find by your verdict whether or not the facts set up by the defendant be true. [Is it true that Hattie R. Fisk, in the fall of 1885, made application to the secretary of the subordinate lodge or society of the Equitable Aid Union for a change in her policy? Did she execute an application in writing, asking that such change be made? Did she cause such application, together with the old policy, to be forwarded to the company? Was that received at the home office or by the supreme accountant and secretary of the Equitable Aid Union? Did that secretary cancel the old policy and issue a new certificate, executing it by the seal of the company, signing it himself and having it

signed by the president? If so, that was an end of the plaintiff's right under the old policy, and the defendant would be entitled to your verdict.]1

"This conclusion is arrived at in view of the terms of the policy and of the by-laws of the company. The part of the policy relating to this point in this case is as follows: 'This is to certify that Hattie R. Fisk, whose application is hereto attached, is a beneficiary member, and that in the event of death while in good standing in this organization, prior to the completed period of expectancy, the sum of $1,175 shall be paid (as directed) to Albert A. Fisk, my husband, subject to change at pleasure on presentation of this certificate, together with new application to the supreme secretary.'

"From the terms or wording of the policy itself, then, it would seem to rest in the power and discretion of the member or applicant to change the designation of the beneficiary, upon the presentation of the original certificate, together with the new application to the supreme secretary.

"The by-laws with regard to that, under the head of 'Laws,' Law 1, beneficiary fund, § 7, are as follows: 'A member desiring to reduce insurance or change policy in any way may make application to the secretary, paying 50 cents for new benefit certificate and surrendering the old one to be forwarded, with the fee and the application, to the supreme accountant; the old benefit certificate in all cases, with all the conditions thereto, remaining in force until the new one bears date, after which assessments coincide with the new certificate.'

"According to that by-law, then, it would appear that the old certificate would remain in force until the new one would bear date. What is the meaning of the expression 'bears date?' That is disclosed, as we think, by another part of the by-laws of the company, which is as follows, and is found in section 1, under the same head:

" 'Every member, upon presenting application for benefit certificate, shall pay to the accountant two assessments for the benefit fund'—for the 'B. F.' it is—'50 cents for B. C., 25 cents for supreme med. ex., one of the said assessments to be held in treasury of subordinate union subject to call, the other assessment, with benefit certificate money and supreme medical examiner's fees, to be forwarded with medical certificate and application for benefit certificate to supreme union at once; insurance

commencing and policy dating on receipt thereof by the supreme union, subject to the approval of the supreme medical examiner.'

"From that, then, it seems that the expression 'bears date' does not refer to the actual date which is put in the policy, but is intended to designate a certain period or a certain state in the transaction between the parties, and that the dating then would be from the time when the discretion of the company had been exercised and it was passed into the hands of the secretary for carrying out in a formal way.

"[Therefore, if you find that the member or applicant, that is to say, Hattie R. Fisk, had carried out her part that was to be performed in order to have a change made in the designation of a beneficiary,—to wit, had made the application therefor, had sent with that the original policy, together with the amount of money required for the accomplishing of that end and the paying of its expenses,—she had done all that was required of her; and if this old policy had passed into the hands of the secretary and a new certificate had been issued by the secretary, signed by himself and by the president, and executed with the seal of the supreme lodge of the Supreme Equitable Aid Union, that would be a cancelation of the original policy and an end of the plaintiff's right thereunder.]" 2

The plaintiff submitted the following points:

"1. The court is respectfully asked to charge the jury that the renewed or second benefit certificate was not executed in accordance with the by-laws, constitution, etc., of the defendant company, and that therefore the first benefit certificate is in full force, and their verdict should be for the plaintiff for the sum of $1,175, with interest from the 12th of January, 1886."

"*Ans.* Refused as explained already in the general charge." (Third assignment of error.)

"2. That if the jury believe from the evidence that Albert Fisk, the plaintiff, insured the life of his wife in defendant company, paid for the same, including all dues and assessments, etc., thereunder, and that the benefit certificate was delivered to him by the direction of his wife, and that he has never legally parted with his rights under the said benefit certificate, then the original benefit certificate is in full force, and their verdict must be for the plaintiff."

"*Ans.* This request is refused. The evidence bearing upon

the question as to whether Albert A. Fisk had paid the dues and assessments was relevant, as you have been instructed to show a compliance upon the part of Hattie R. Fisk with her part of the contract; but such payment would not vest any other title in A. A. Fisk or give to him any other claim against the defendant company than is shown by the policy and the application." (Fourth assignment of error.)

"3. That if the jury believe from the evidence that the change of benefit certificate was made without the knowledge or consent of the plaintiff, then the cancelation of the old and issuing of the new benefit certificate was a fraud upon the plaintiff, and defendant company is still liable upon the original contract with the plaintiff."

"*Ans.* Gentlemen of the jury, you will have perceived, from what has been said to you already, that the view we take of this matter is that it rested only in the pleasure or the will of Hattie R. Fisk to change the beneficiary in the policy or in the insurance. Therefore, if she exercised such will it could not be fraud upon the plaintiff, and, therefore, this point is refused." (Fifth assignment of error.)

"4. That under the law and the evidence in this case the plaintiff is entitled to recover the amount of the original benefit certificate with interest."

"*Ans.* Refused. It is left with you, gentlemen of the jury, to say whether or not Hattie R. Fisk made such application for a change in the beneficiary in the policy of insurance and complied with the terms of the original policy and of the by-laws of the company. If she did, then your verdict should be for the defendant. But if you are not so satisfied, then you should find in favor of the plaintiff for $1,175 with interest from ninety days after the death of Hattie R. Fisk." (Sixth assignment of error.)

The jury rendered a verdict for defendant, upon which judgment was entered, and plaintiff took this writ. The assignments of error specified: (1, 2) The portions of the charge inclosed in brackets and indicated respectively by exponents; and (3–6) the answers to the points.

E. P. Gillespie, for plaintiff in error.—Cited Pingrey v. National L. Ins. Co. 144 Mass. 374, 11 N. E. 562.

E. S. Templeton for Mary Fisk and A. H. McElrath, guardian, interpleaders.

OPINION BY MR. JUSTICE STERRETT:

The benefit certificate issued by defendant to Mrs. Hattie R. Fisk was made payable "in the event of her death," etc., to her husband, the plaintiff, subject to change at her pleasure, "on presentation of this certificate together with new application to the supreme secretary."

Notwithstanding the fact that the certificate was delivered to plaintiff and the assessments thereon were paid by him, his wife had the right, on presenting it to the supreme secretary, to apply for and effect a change in designation of the beneficiary named therein. Having obtained possesssion of the certificate—in what manner does not appear—she surrendered it and obtained a new one, payable as follows: To her husband, Albert A. Fisk, $375; to her mother, Mary Fisk, $300; to her son, Freddie F. Fisk, $300, and to her sons, Jimmie and Truman Fisk, each $100, subject to change as provided in original certificates.

When plaintiff accepted the original certificate and paid the assessments thereon he knew or ought to have known that he held it subject to the right of his wife to change the designation of those to whom the insurance money should be paid upon her death. There is no evidence that she ever waived that right, or in any manner estopped herself from exercising it. The second certificate became a substitute for the first; and hence the money is payable as therein designated, unless the surrender of the original and issue of the new certificate were irregular and invalid.

The learned judge's construction of defendant's by-laws, and his instructions relating to the regularity of the transaction, were substantially correct; and, in view of the facts which the jury must have found in reaching the conclusion they did, the validity of the second certificate cannot now be questioned. Indeed, the association defendant appears to have always recognized its validity as a substitute for the original; and, since the rendition of the verdict in this case, it has paid into court, $1,175, the full amount of the insurance, thus leaving the court to determine whether it shall be paid out as designated in the original, or as specified in the second certificate. The affirmance of this judgment virtually determines that, as one of the beneficiaries designated in the second certificate, plaintiff is entitled to

$375, and no more, and that the other beneficiaries are entitled to the sums payable to each of them respectively according to the terms of same certificate.

It is unnecessary to notice either of the assignments of error specially. There is nothing in any of them that requires a reversal of the judgment.

Judgment affirmed.

Julius P. Billington, to Use, etc., Plff. in Err., *v.* Gautier Steel Company, Limited.

A plaintiff who recognizes a party as an officer of a company defendant, for the purpose of bringing it into court, is estopped from treating him as a stranger and denying his right to present any defense that may be properly interposed on behalf of the company, as the nonexistence of the company by decree of dissolution.

An affidavit of defense, averring facts which furnish the necessary material for a formal plea in abatement, is sufficient to prevent judgment.

In an action of debt upon a duly certified record of a Canadian judgment, the summons was returned: "Served on the Gautier Steel Company, Limited, a partnership association under the act of June 2, 1874, and its supplements, by giving a true and attested copy of the within writ to William S. Robinson, secretary of said company, etc." Robinson filed an affidavit in which he averred that the association had been dissolved by decree of court and its business settled and that he, the deponent, had no authority to act for the defendant. The affidavit further disclosed that, before the summons was issued, the same court which had decreed the dissolution had, on the petition of the use plaintiff representing that suit had been brought on the claim and an appearance entered for the defendant before, but judgment entered after, the decree of dissolution, rescinded the decree of dissolution, and entered a decree restoring the company to all its rights and privileges and subject to all its liabilities. Held, that the affidavit was sufficient to prevent judgment.

It seems that a duly certified record of a Canadian judgment, in an action for an alleged tort for furnishing goods which had been paid for but were alleged by the purchaser to be defective in quality, is within the affidavit of defense law.

(Argued March 30, 1887. Decided April 11, 1887.)

Cited in Pierson v. Gaskill, 23 Pa. Co. Ct. 116, 30 Pittsb. L. J. N. S. 250, 9 Pa. Dist. R. 554, holding plaintiff not entitled to judgment where affidavit of defense sets forth facts sufficient to furnish material for plea in abatement.

January Term, 1887, No. 146, E. D., before MERCUR, Ch. J., TRUNKEY, STERRETT, and GREEN, JJ. Error to Common Pleas No. 2 of Philadelphia County to review the action of the court in discharging a rule for judgment notwithstanding an affidavit of defense in an action of debt upon an exemplification of record of judgment. Writ dismissed.

The exemplification of record filed, upon which suit was brought, showed, *inter alia,* that the writ was issued against the defendant in the court of Queen's bench in Canada, July 15, 1881; that, on the same date, service was accepted, and on July 25, formal appearance entered for the defendants; that the cause of action was an alleged tort for furnishing goods which had been paid for, but were alleged by the purchaser to be defective in quality; and that judgment was recovered for $357.50 and $608.36 costs, March 30, 1882.

The affidavit of defense, after setting out the facts recited in the opinion of the supreme court, proceeded as follows:

"On April 15, 1886, the petition of the parties to whose use this suit is now marked, was presented to the court of common pleas of Cambria county, setting forth their claim against the said association and praying for a citation to be issued to the surviving liquidating trustees, requiring them to appear and show cause why the said decree of dissolution and proceedings to dissolve the said association should not be opened and set aside, and the said trustees ordered to pay the plaintiff's claim and costs, if any sufficient cause to the contrary should not be shown. Thereupon, a citation was issued in accordance with the prayer of the said petition, and an answer to the same was filed by Powell Stackhouse and this deponent, as survivors of those who had been liquidating trustees as aforesaid, in which answer the respondents set up all the facts and matters connected with the dissolution of the said company, the appointment of the said trustees, the winding up of the business of the said association, and the distribution of the net proceeds of its property and the final discharge of the said trustees as is hereinbefore detailed and set forth.

"Notwithstanding all the said facts were thus brought to the notice and knowledge of the said court in the answer so filed, it entered an order or decree on the fourth day of October, 1886, in the following words:

"'And now, October 4, 1886, this case having been fully heard on petition, answer, and testimony, it is held and adjudged that the decree of this court of December 12, 1881, decreeing the final dissolution of the said Gautier Steel Company, Limited, be set aside, and the said company be restored to all its rights and privileges, and subject to all its liabilities.' (Reported in 2 Pa. Co. Ct. 399.)

"Notwithstanding the order of court last above recited, this deponent is advised and submits to the court that it was not in the power of the court of common pleas to restore to life and being such limited partnership association after it had been formally and properly dissolved in accordance with the laws of this state, and that such an order of court as last above recited could not and would not restore this deponent to his office of secretary in said association which he held at the time that dissolution of said association was declared in August, 1886.

"Deponent further saith that neither he nor either of his associate liquidating trustees had any notice or knowledge at any time while the said association was carrying on its business, or while they were winding up the business thereof, under the trust aforesaid, that the plaintiff had or held any claim or demand against the said association in any way or manner whatsoever; nor had they any notice of an assertion of claim by the plaintiff until the petition for the vacation of the decree of dissolution was filed on April 15, 1886.

"This deponent also suggests and submits to the court that the copy filed in this case is not such an instrument of writing as entitles the plaintiff to a judgment for want of an affidavit of defense."

The plaintiff took a rule for judgment for want of a sufficient affidavit of defense, which the court subsequently discharged.

The assignments of error specified the action of the court in discharging the rule for judgment, and in refusing to enter judgment for the plaintiff notwithstanding the affidavit filed.

John H. Sloan, for plaintiff in error.—The affidavit of defense filed in this case does not purport to be on behalf of the defendant, but is made by an individual not sued, and on his own behalf. It should, therefore, not be considered. Griel v. Buckius, 114 Pa. 187, 6 Atl. 153.

The dissolution of the association in 1881 was obtained through a proceeding which contained the statement required by the act of assembly, that all debts and liabilities had been paid; this was not so, as the record of the cause in Canada shows that Billington's suit was pending before any steps to dissolve were taken.

There is no defense shown on the merits. There is no allegation of payment, fraud, or want of jurisdiction. The proceedings in Canada were with full notice to the defendant; for they appeared there and employed counsel who contested the cause, all of which is not denied.

The record of this judgment comes within the very words of the affidavit of defense law. Act March 28, 1835 (1 Purdon's Digest, p. 1356).

It has often been decided in Pennsylvania that the records of judgments of foreign (state) courts come within the law. Hogg v. Charlton, 25 Pa. 200; Moore v. Fields, 42 Pa. 467; Luckenbach v. Anderson, 47 Pa. 123; Palmer v. March, 64 Pa. 239; Power v. Winsor, 3 W. N. C. 360.

And there is no difference in principle in this respect between state records and records of foreign countries. It is not our act of Congress for the authentication of records passed in execution of the constitutional provision, which gives them validity under our affidavit of defense law.

For the purpose of judgment for want of a sufficient affidavit of defense, a judgment insufficiently certified under the act of Congress is sufficient. Wetherill v. Stillman, 65 Pa. 105.

This court has held that judgments of other jurisdictions are sufficient under our affidavit of defense law, and this without reference to any rule of court, it being clearly determined that such records are within our act. Moore v. Fields, 42 Pa. 467.

The affidavit of defense law is to be liberally construed. Vulcanite Paving Co. v. Philadelphia Traction Co. 115 Pa. 280, 8 Atl. 777.

Section 1 of article 14 of the Constitution of the United States, providing for the credit to be given to the records, etc., of the states, was adopted at a time when it was still an open question in international law as to the effect of foreign records; but it has since been settled by the courts of all civilized countries that such records are conclusive in the absence of fraud or want of jurisdiction, and therefore none of our cases put the

conclusiveness of such records on the ground of the constitutional provision. 2 Am. Lead. Cas. ed. 1871, pp. 612, 615; 2 Smith, Lead. Cas. 6th Am. ed. 679, 841; Doglioni v. Crispin, L. R. 1 H. L. 301; De Cosse Brissac v. Rathbone, 6 Hurlst. & N. 301; Imrie v. Castrique, 8 C. B. N. S. 415; Lazier v. Westcott, 26 N. Y. 146, 82 Am. Dec. 404.

In the above New York case the whole question, which arose upon a Canadian record, is fully discussed.

In Pennsylvania it has also been held that an Australian judgment showing jurisdiction is binding. Wernet's Appeal, 91 Pa. 321.

As to the suggestion that the judgment in Canada was entered after the decree of dissolution, it is a sufficient answer to say that the decree of dissolution having been entered wrongfully, so far as the steel company was concerned, upon an incorrect statement of the payment of its liabilities, it will be considered as not entered at all; and, indeed, the subsequent decree of October 18, 1886, vacating it, which was entered before this suit was brought, relates, of course, back to the date of the original decree of dissolution; and for that reason also in this proceeding it must be treated as a nullity.

In England a foreign or colonial judgment can be attacked only for want of jurisdiction or fraud. Bank of Australasia v. Nias, 16 Q. B. 717; Notes to Duchess of Kingston's Case, 2 Smith, Lead. Cas. Hare & W. 677.

An action in England upon the record of judgment of a French court was sustained. Godard v. Gray, L. R. 6 Q. B. 139; approved in Castrique v. Imrie, L. R. 4 H. L. 414.

And in this country the same rule prevails. 2 Kent, Com. 119.

A judgment of New Brunswick was held conclusive in Maine. Rankin v. Goddard, 55 Me. 390.

A judgment of the superior court of appeals of the four free cities of Germany was held conclusive in New York. Konitzky v. Meyer, 49 N. Y. 571; Andrews v. Herriot, 4 Cow. 520, note 3.

The judgment of a justice of the peace, of Pennsylvania, not certified under the act of Congress, was held a good cause of action in Ohio. Silver Lake Bank v. Harding, 5 Ohio, 547.

The English and American cases will be found collected and commented upon in 4 Wait, Act. & Def. p. 189.

Joseph B. Townsend, for defendant in error.—A company organized under the act of 1874 is in effect a corporation, or at least has the privileges, incidents, and characteristics of a corporation. Com. v. Sandy Lick Gas, Coal & Coke Co. 40 Phila. Leg. Int. 272; Patterson v. Tidewater Pipe Co. 12 W. N. C. 452; Freedley, Lim. Part. p. 6.

Death of the defendant at any time before the service of the writ, or after service and appearance and before plea pleaded, is always a good plea in abatement. 3 Chitty, Pl. p. 20, 7th ed.

And the defendant being dead some other party must intervene and plead his death in abatement. M'Cabe v. United States, 4 Watts, 325; Wentworth, Pl. 49; 1 Comyn's Digest title, *Abatement;* Rowan v. Woodward, 2 A. K. Marsh. 140.

A corporation is under no implied obligation to its creditors to continue to carry on business. The creditors of a corporation are not parties to the charter contract, nor have they any interest in the franchises granted by the state to the body of corporators. Morawetz, Priv. Corp. § 806, p. 773; Mumma v. Potomac Co. 8 Pet. 286, 8 L. ed. 947, and note; Smith v. Chesapeake & O. Canal Co. 14 Pet. 45, 10 L. ed. 347; Curran v. Arkansas, 15 How. 310, 14 L. ed. 708; Chicago L. Ins. Co. v. Needles, 113 U. S. 574, 28 L. ed. 1084, 5 Sup. Ct. Rep. 681; Mobile & O. R. Co. v. State, 29 Ala. 573; Barr v. Bartram & F. Mfg. Co. 41 Conn. 506; King v. Accumulative Life Fund & General Assur. Co. 3 C. B. N. S. 151; Kearns v. Leaf, 1 Hem. & M. 707.

The method for enforcing the claims of creditors would be by establishing them at the settlement of the accounts of the trustees charged with the liquidation of the company's affairs, or, if not proven before and paid by the latter, then by reclamation against the shareholders, who receive any distributive shares from the proceeds of the company's assets. This remedy is a purely equitable one, and to be enforced by proceedings in equity. McLean v. Eastman, 21 Hun, 314; Conro v. Gray, 4 How. Pr. 166; Fisk v. Union P. R. Co. 10 Blatchf. 518, Fed. Cas. No. 4,830; Irons v. Manufacturers' Nat. Bank, 6 Biss. 301, Fed. Cas. No. 7,068; 2 Morawetz, Priv. Corp. pp. 765, 766, 768; Crowther v. Upland Industrial Co-op. Asso. 1 Del. Co. Rep. 264.

The inability to call the dissolved company into court through

properly authorized officers shows the whole proceeding vacating the dissolution to have been *coram non judice*.

The cause of action in this case, as the record filed shows, did not arise out of any contract to pay money, express or implied; and inasmuch as the text of the affidavit of defense law does not, in terms, include records of this character, the operation of the act should be limited to exclude such cases as the present. Any extension of the act to cover them should result from legislative and not judicial action.

In all the Pennsylvania cases on the other side, the records of which copies were filed were those of a judgment in some sister state within the United States of America, with the single exception of Wernet's Appeal, 91 Pa. 321, which was not a case of an application for a judgment for want of an affidavit of defense, but was an application to open a judgment entered by confession, and is in nowise applicable to the question involved here.

J. H. Sloan, in reply.—The argument of the defendant in error, as to the service of the writ, is based on the assumption that the question of the return of the sheriff was before the court on this writ of error; of course, no such question is on this record, and if it were, it would be unnecessary to say that the conclusiveness of a sheriff's return in a case like this has been so often settled by this court, that it cannot now be a disputed question. Kleckner v. Lehigh County, 6 Whart. 70; Kennard v. New Jersey R. & Transp. Co. 1 Phila. 41.

The argument of the defendant in error, and cases cited in relation to the proceedings in cases of defunct corporations, have no application here. If this suit had been brought without first having the decree of dissolution set aside, there might have been some force in it; but this is not a corporation, and the mode of procedure in suits against it is regulated by the statutes applicable to such associations, and therefore such mode must be followed.

There is no appeal from, or writ of error to, the order of Cambria county court, setting aside the decree of dissolution which is part of the record of this cause, as it appears in the affidavit of defense in full. Such order is, therefore, conclusive; and the association is not dead but alive, and was when this suit was brought.

OPINION BY MR. JUSTICE STERRETT:

This action of debt is on a duly certified record of judicial proceedings in Queen's bench division of the high court of justice of the province of Ontario, Canada, wherein judgment was rendered in favor of plaintiff and against defendant for $357.50 and costs.

The summons was returned: "Served on the Gautier Steel Company, Limited, a partnership association under the act of June 2, 1874, and its supplements, by giving, October 30, 1886, a true and attested copy of the within writ, to William S. Robinson, secretary of said company, and making known to him the contents thereof."

Robinson, the person thus served as secretary of defendant, intervened, and filed an affidavit of defense, in which it is averred, *inter alia*, that when the writ was served he informed the deputy sheriff that he was not secretary of defendant; that said company or association had been dissolved by decree of court, its business wound up and settled, and that he, deponent, had no agency, power, or authority to represent or act for the said defendant.

It is further averred, in substance, that the Gautier Steel Company, Limited, was organized in May, 1878, under the act of 1874, and after transacting business for over two years was duly dissolved by decree of the proper court on December 12, 1881; that from that time to the present "no such company, partnership, association, or business concern of any character known as or called the Gautier Steel Company, Limited, has ever had any entity or existence."

It also appears by the affidavit that nearly five years thereafter, on petition of the use plaintiff, the same court made an order rescinding its former decree of dissolution and restoring the company "to all its rights and privileges, and subject to all its liabilities."

The court below having discharged the rule for judgment, the sole question for our consideration is the sufficiency of the affidavit of defense.

It is contended, in the first place, that, inasmuch as the affidavit does not purport to be on behalf of the defendant, "but is made by an individual not sued, and on his own behalf," it should not be considered. The obvious answer to this is that plaintiff, having recognized Robinson as secretary of the com-

pany defendant, for the purpose of bringing it into court, is not in a position to treat him as a stranger to the proceedings and deny his right to present any defense that may be properly interposed on behalf of the company.

It is further contended that the affidavit does not disclose any valid defense; but we cannot assent to this proposition. Limited partnership associations, organized under the act of 1874, are in affect corporations, or quasi corporations. They are creatures of the law, and by its express provisions they may be dissolved and thus cease to exist. In a suit against a corporation, it cannot be doubted that its previous dissolution may be interposed as a defense with the same effect as the death of a natural person.

The act of June 24, 1885, provides that "in every suit or judicial proceeding to which a corporation is a party the existence of such corporation shall be taken to be admitted unless it is put in issue by the pleadings." The proper time to interpose the fact of dissolution or nonexistence of a corporation defendant is when the affidavit of defense is filed. If the facts therein averred furnish the necessary material for a formal plea in abatement, the affidavit is sufficient to prevent judgment.

The affidavit in this case contains everything that is required for a good plea in abatement. It avers in positive terms the formal dissolution of the company and discharge of the liquidating trustees nearly five years before the commencement of this suit.

It is no answer to say that in less than a month before the summons in this case was issued, the same court (on petition of the use plaintiff) rescinded the final order of dissolution made so long before. Under certain circumstances, perhaps, a court might be warranted in rescinding a previous decree; but there is nothing in this record that would authorize the recreation of a corporation or limited partnership association which the court by its decree had dissolved nearly five years before.

There is no merit in the defendant's position that the record of a foreign court is not within the affidavit of defense law.

Writ of error dismissed, at the costs of plaintiff, without prejudice, etc.

Martin Schuck, for Use of J. D. Potter, Plff. in Err., v. City of Pittsburgh.

A mandamus execution to the assignee of part of a judgment against a municipal corporation may be properly refused.

(Argued November 4, 1887. Decided November 11, 1887.)

October Term, 1887, No. 230, W. D., before GORDON, Ch. J., PAXSON, STERRETT, and WILLIAMS, JJ. Error to the Common Pleas No. 1 of Allegheny County to review the action of the court in refusing a mandamus execution to the assignee of a part of a judgment against a municipal corporation. Affirmed.

Martin Schuck obtained a verdict against the city of Pittsburgh on March 22, 1887, in the sum of $400 as damages for personal injuries suffered through negligence of defendant's officers in not keeping a board walk in repair. Judgment was duly entered on the verdict on May 13, 1887. On June 6, 1887, said Martin Schuck, plaintiff, assigned of record $150 of this judgment to John D. Potter. On July 14, 1887, the defendant city paid the full amount of the judgment to Martin Schuck, the plaintiff, or to his attorney, and declined to pay said assignee, John D. Potter. Said John D. Potter then petitioned the court on August 10, 1887, setting out above facts for a writ of mandamus execution, under the provisions of the act of April 15, 1834, directed to the city treasurer, to enforce the collection of his said judgment.

The court refused to grant said writ of mandamus execution, and on September 14, 1887, discharged the rule to show cause why the same should not issue. To this action of the court in refusing to award said mandamus execution, said assignee excepted, and took the present writ of error, assigning as error the action of the court: (1) In refusing to award plaintiff a mandamus execution; (2) in discharging the rule to show cause why a mandamus execution should not issue; (3) in discharging the rule for a mandamus execution as follows: "Rule discharged; to which petitioner excepts, and bill sealed."

W. D. Moore and *F. C. McGirr,* for plaintiff in error.—The court refused to allow the use plaintiff in this case to have execution against the defendant, on the ground, as orally stated, that a partial assignment of a claim against a municipality was of no validity, citing Philadelphia's Appeal, 86 Pa. 179; and Geist's Appeal, 104 Pa. 351.

It is submitted that these cases are not in point, for there the claims assigned were to several persons, and were unliquidated; and those decisions go expressly on the ground that where a municipal corporation enters into an entire contract with one to do certain work, and the said contractor assigns portions of that contract to several others, the city is not bound to recognize the assignments, because of the uncertainty of the amounts that may be finally due each assignee; and if said assignees should disagree as to the amounts due each, "it would subject its officers to vexatious annoyances, and the city to litigation and costs. . . . A municipal corporation should not be subjected to the embarrassments, responsibilities, and costs of adjudicating contracts to which it was not a party." Philadelphia's Appeal, 86 Pa. 179.

In the present case there is no uncertainty; the claim is liquidated; it does not arise upon a contract, but is an assignment of record of an exact sum—part of a judgment obtained against the city for a tort.

Where there is a judgment, the record is the proper place to give notice of its assignment. Coon v. Reed, 79 Pa. 240.

Payment to plaintiff, after notice of the assignment of a judgment, is not payment to the proper person. Guthrie v. Bashline, 25 Pa. 80.

Under the decision of this court, in case of Monaghan v. Philadelphia, 28 Pa. 207, the petition in the present case for a mandamus execution directed to the city treasurer was the proper proceeding. And see Troubat & H. Pr. § 1467.

There is no answer to the petition or to the rule to show cause, in this case.

It is said in Com. *ex rel.* Coon v. Floyd, 2 Pittsb. 425, that the act of April 15, 1834, gives as a matter of right, a mandamus execution to enforce a judgment against a county; and in Monaghan v. Philadelphia, that it is the proper and only way to enforce a judgment against a city.

W. C. Moreland, for defendant in error.—The assignee is a stranger on the record. The city owes him nothing. He can have no claim, saving that arising from the voluntary act of the plaintiff or claimant. Is the city bound to hunt up such persons and make investigation of matters wholly foreign to the litigation?

Is this partial assignment valid and binding upon the city?

In Philadelphia's Appeal, 86 Pa. 179, this court said: "The question now presented is whether such a corporation (municipal) is bound to recognize an assignment of a part only of its obligation. If it must one uncertain part, we see no just reason why it must not as many parts as the convenience or whim of the obligee shall induce him to assign. The probable and natural effect of holding the municipality liable to each assignee would subject its officers to vexatious annoyances and the city to litigation and costs. . . . The policy of the law is against permitting the individuals, by their private contracts, to embarrass the financial officers of a municipality. . . . A municipal corporation should not be subjected to the embarrassments, responsibilities, and costs of adjudicating contracts to which it was not a party."

The same doctrine is laid down by this court in Geist's Appeal, 104 Pa. 354.

PER CURIAM:

From all that we have before us, in this case, we cannot say that the court erred in refusing the mandamus prayed for.

The judgment is affirmed.

William A. McDevitt et al., Partners as W. E. McDevitt & Company, and George C. Wilcher, Plff. in Err., *v.* Moses Vial and Sarah His Wife, to the Use of Said Wife.

A married woman who has purchased personal property with funds raised by a public subscription and presented to her can hold such property, free from the claims of her husband's creditors.

Where an execution was issued against a husband on a judgment against

husband and wife for necessaries, and both husband and wife claimed the exemption, and the property was found to be worth less than $300, the court, on a second execution and levy against the wife, followed by a sale of some of the property first levied upon, is not bound to instruct the jury that they must find the property first levied on was the property of the husband; but the wife may be permitted to show that a portion of it was her own.

(Argued November 2, 1887. Decided November 11, 1887.)

October Term, 1887, No. 132, W. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Error to the Common Pleas No. 2 of Allegheny County to review a judgment in favor of the plaintiffs in an action on the case to recover damages for unlawfully selling property on an execution. Affirmed.

November 15, 1886, W. A. McDevitt & Company, doing business in Braddock, Pennsylvania, obtained judgment before a justice of the peace against Moses Vial and Sarah Vial of the same place for $72 for groceries and other goods bought at their store on an account opened in the name of Sarah Vial. On December 10, 1886, an execution was issued against Moses Vial individually and placed in the hands of George C. Wilcher, a constable. Mr. and Mrs. Vial claimed the benefit of the exemption laws, and appraisers were appointed who reported that there was not sufficient goods levied on to amount to $300. An alias execution was subsequently issued against both defendants; an indemnity bond was given to the constable and goods were sold of a sufficient amount to satisfy the debt.

At the time of the first levy Mrs. Vial claimed that a part of the goods were her own and a part belonged to a son and daughter. At the trial the plaintiffs proved that in 1885 they lived in Irwin, Pennsylvania; that in that year a fire occurred and all their goods were burned. Mrs. Vial testified that in consequence of the fire a subscription was taken up and the money raised amounting to $147 had been given to her; that her father gave her $50 and that neighbors gave her bedsteads, dishes, etc., and that she had bought the goods levied upon and sold, with the money that was thus given to her.

The plaintiffs offered in evidence, under objection, a subscription list headed as follows: "We, the undersigned, agree to pay the amount opposite our respective names for the benefit

of Mrs. S. Vial and family, a sufferer from the late fire." Objection overruled and evidence admitted.

The defendants submitted, *inter alia,* the following points:

2. "That the property donated to Sarah Vial by various persons for the use of herself and her family, and the property which she bought with the money which was donated to the use of herself and family by such persons, is not such property as is by law exempt from levy and sale of the debts of the husband."

Refused.

7. "If the jury believe from all of the evidence in the case that Sarah Vial, the plaintiff, had, at or about the time of the levy and sale of the property which she claims was hers, other property liable to execution, which she fraudulently removed, concealed, or withheld from the officer with a design or intent to prevent, hinder, or delay the collection of the judgment of W. A. McDevitt & Company, it is an absolute bar to this action, and the verdict should be for the defendants."

Refused. Because there is no evidence to sustain it.

8. "That from all of the evidence in the case, it is the duty of the jury to find that the property set aside by the appraisers, by and in pursuance of the notice of claim of exemption given to the officer at the time that he made the levy on the execution which was issued against Moses Vial, was the property of Moses Vial, and their verdict should be for the defendants."

Refused.

The court charged, *inter alia,* as follows:

"It seems in this case that, first, execution was levied against all the furniture in the house. The wife, the present plaintiff, claimed one portion of it, and the son and daughter claimed the other portion, they contending that Moses Vial, the husband of the present plaintiff, had not anything at all. That was the claim set up before the constable; he had no right to levy on the property of the daughter or son on that execution, if he knew it to be the daughter's or son's; yet being in the house where Moses Vial lived and where he was carrying on a saloon, or a tavern, licensed in his own name, the constable, and the plaintiff in the execution, had a right to presume that all the property in the house belonged to Moses Vial. I say he had a right to presume that, because prima facie in law it was his property. Still, if the wife owned any property, not derived through her husband,

she would have a right to claim it and to establish her claim; so would the son or daughter.

"The constable having appraised all the property in the house, and the whole of the property amounting to less than $300, he stopped. If the property had amounted to more than $300, of course, it would have been his duty to have ascertained more closely what property the wife claimed. But as the claim did not amount to $300, it seems that he stopped. He had no right to levy on the property of the son or daughter on that execution; he could only levy on the property of Moses Vial or his wife, and as they claimed the whole of the property, of course he stopped. He ought really to have set apart what was claimed by the wife; that would have been the better way, and he then could have tested the right of the son and daughter, after levying upon that property as the property of their father, if he believed it was his property and not theirs. The husband and wife both gave notice claiming the benefit of the $300. I doubt not that under it, if there had been some property belonging to the husband and some belonging to the wife, the constable might have set aside a part to the husband and a part to the wife, providing the whole amount did not exceed $300. The constable testified that he set apart this, not as the property of Moses Vial, but claimed by the wife, the daughter and son; he did not know which property was the wife's and which the son's and daughter's. After that a second execution went out, which was for the purpose of getting at the wife's property. On the first execution he could not sell the wife's property, because he had to make it out of the husband's property if he had any. On the second execution he could sell the wife's property. I believe she gave notice again; or rather, I believe, both of them gave notice to the defendants in this case that they claimed the property that had been set aside on the previous execution to be exempt and that if they proceeded to sell they would proceed at their peril. The defendants indemnified the constable to sell; and the constable did sell, and sold, it is alleged, some of the very things that had been set apart for the wife in the previous proceedings.

"Now, it is immaterial in this case whether these other articles claimed by the son and daughter belonged to them or not. It is not material whether they belonged to the husband. The husband may have had other property; he may have fraudulently removed a great deal of property from the house. It does not

affect the wife's claim in this case; if she had a valid claim, it cannot be destroyed by any fraud that the husband may have committed before.

"The first question, therefore, for you to pass upon is this: Was the property that is now claimed by the wife the property of the wife? She must prove to you, and to your entire satisfaction, that it was her separate property, acquired wholly independent of her husband, and not through him in any way. . .

"The counsel for the defendants has stated a point of this kind: That if that money was contributed to her for her use and the use of the family, it is not her property but might be levied on for the debt of the husband. I refuse that. If it was given to her and given to her for her use and the use of her family, it was her separate property and could not be levied upon for the debts of the husband.

"The next point would be the value of these articles if set apart for her; but under the testimony of the constable I suppose there can be no question about that, unless it might be that he ought to have designated at that time the particular articles of furniture that belonged to her. I do not think that is material. There was nothing claimed by the husband. She, her son, and daughter claimed all in the house. He appraised all in the house, and the whole amount did not come to $300, so that that covers whatever she had; he would have had a right to have required her to point out specifically what belonged to her and what she claimed. When he went back with the second execution he levied on, I presume, everything, nearly, in the house. The second execution was issued two days after the other was returned. The defendants claimed the right to protest the validity of her claim, and they indemnified the constable and directed him to proceed and sell the property. Of course they did that at their own peril; they ran the risk by that proceeding of a suit to establish their title. The whole amount of property sold amounted to about $118.

"Now I go to the question of damages. If you find all of these facts in favor of the plaintiff, then the next question would be the amount of damages to which she is entitled. It is true, according to a point presented by the plaintiff's counsel, that in an action of this kind where the jury believe from the evidence that the defendant has acted in an oppressive way and in a wanton disregard of a party's rights they are not limited to the

actual amount of the value of the property but may go beyond that and give what is called exemplary damages—something in the nature of a punishment for the gross outrage and wrong committed. Before a jury go beyond compensatory damages they ought to be satisfied that the wrong had been done with a high handed spirit and a disposition to oppress and do wrong. Where there is not evidence to sustain that motive or purpose, the jury should not allow anything more than mere compensatory damages, that is, damages equal to all the injury done. Now bearing on that we have this: Mrs. Vial testified to a great many articles and she puts the value on them at about $190. She gave what the articles cost originally, that is, the carpet, matting, mattress, bedstead, pillows, wash bowls, fixtures, looking glasses, chairs, etc., I think, at $190; these would not be worth as much after being in use after a year or so, or six months, whatever time it was, as they were worth at first—carpets, mattings, and things of that kind, especially, that might be worn a little. Bearing on that is the testimony of the appraisers themselves; it is some evidence, not conclusive. The whole amount of things in the house appraised amounted to less than $300—$280. Then the price that these articles sold for at the sale is a matter to be considered, although it is not conclusive against the plaintiff. Articles may be sold at a great sacrifice at a public sale; but the price that they bring at a public sale is some evidence of the value, and some evidence that the jury should take into consideration. Not only the articles that Mrs. Vial claims in this case but a great many other articles were embraced in that sale, and the whole amount came to $118. Of those articles Charles Vial, the son, bought to the amount of $28; one item is the safe, and he bought the bedstead and two carpets, bowl and pitcher and safe, amounting in all to $28.25. Mrs. Vial bought (or at least the articles were knocked down in her name, and according to the constable the son paid for them) bed-room set $7, carpet $3.60, stand $3.10, bed and bedding $7.25, etc. The articles that she bought at the sale amounted to $35.70; the aggregate of the amount purchased by her and her son was $63.95, so that all the other articles sold at that sale that were taken away amounted to only $54. She purchased in some of the things that she claims and purchased some things that she does not claim—that, I think, she said belonged to her daughter. The son purchased the safe at $20; I think that really was not re-

quired to be paid; but it is the same thing; I have counted it because that is included in the $118, proceeds of the sale, and I say only about $54 was realized from the sale of other articles than what the son or plaintiff in this case got; of course the safe was not taken away. Now you are not limited to these figures. The plaintiff did not lose these articles that she bought in at the sale; she had to pay that much to save them; and if it was a wrongful sale, she is entitled to recover back that amount; and, as I said, you are not limited to that because you may go beyond it; it is an element that may be considered by the jury in estimating her loss. What did she lose in consequence of the wrongful act of the constable and the plaintiff in the execution?

"There is some controversy as to some of these articles that she claims were not brought from Irwin by her. I think she claims nine beds and bedsteads, but she admitted when last on the stand that only five of these were brought from Irwin station. As I said to you, all that was bought after they came to Braddock, if bought with money realized in the hotel, or boarding house, would be the property of the husband, whether bought on credit or bought for cash. If she brought any money with her from Irwin station, that was given to her, and bought articles with that money, those articles would be her separate property."

Verdict and judgment for plaintiffs, for $56.

The assignments of error specified the admission of the plaintiffs' offer in evidence, as above, and the answers to the defendants' points.

Edward F. Duffy, for plaintiffs in error.—Mrs. Vial could not hold the money given to her for the benefit of herself and family "as her own separate property," to the exclusion of her husband's creditors. Winter v. Walter, 37 Pa. 155.

Whatever may be said of the property purchased by Mrs. Vial with the money given to her and that earned by washing, it being mixed and confused with other property purchased with the joint earnings and on the joint credit of herself and husband, so as not to be distinguishable, it was not such property as is exempt from execution for the liabilities of her husband. Hallowell v. Horter, 35 Pa. 375.

To bring the property of a married woman under the protection of the act of 1848 it is made necessary by the letter as well

as the spirit of the statute to prove that she owns it. Evidence that she purchased it amounts to nothing, unless it be accompanied by clear and full proofs that she paid for it with her own separate funds. Keeney v. Good, 21 Pa. 349; Walker v. Reamy, 36 Pa. 410; Gault v. Saffin, 44 Pa. 307; Baringer v. Stiver, 49 Pa. 129; Lochman v. Brobst, 102 Pa. 481; Leinbach v. Templin, 105 Pa. 522; Hallowell v. Horter, 35 Pa. 375.

The husband, as the head of the family, is presumed to be the owner of all the personal property owned by the family, until the contrary is proven. Topley v. Topley, 31 Pa. 328; Walker v. Reamy, 36 Pa. 410; Winter v. Walter, 37 Pa. 155; Curry v. Bott, 53 Pa. 400; Pier v. Siegel, 107 Pa. 502.

As the execution of December 10, 1886, was issued against Moses Vial the property was levied upon as his, and was subsequently appraised as such in pursuance of a notice claiming the benefit of the exemption law; and Mrs. Vial was not entitled to claim such property as her separate property, and have it appraised and set apart to her as such on the execution against her husband, individually.

The court should have affirmed the defendants' seventh point. There was evidence that a portion of the property levied upon had been fraudulently removed before the appraisement was made.

(No paper book was presented, *contra*.)

PER CURIAM:

This case was carefully submitted to the jury on the facts, and the points presented were well ruled; hence the assignments of error cannot be sustained.

The judgment is affirmed.

Jesse C. Coulston, Plff. in Err., *v.* Abner Bertolet et al.

An affidavit of defense alleging a payment on account must distinctly aver the same and must also state how and at what time the alleged payment was made.

(Argued January 12, 1888. Decided January 23, 1888.)

Cited in Standard Bldg. Asso. v. Hishel, 7 York Legal Record, 81.

July Term, 1887, No. 73, E. D., before PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Error to Common Pleas No. 2 of Philadelphia County to review a judgment for the plaintiffs for want of a sufficient affidavit of defense. Affirmed.

The facts were as follows:

The firm of Abner Bertolet brought suit against Jesse C. Coulston and Charles W. Coulston upon a book account, claiming $153.02 and allowing a credit of $8.07.

Each of the defendants filed an affidavit of defense, the material portion of that of Jesse C. Coulston being as follows:

"That neither the book entries filed by plaintiffs, nor the statement furnished him September 13, 1883, includes $36.75 paid by defendant and to which he is entitled as a credit in addition to the credits allowed in the copy filed. This reduces the claim to $108.20, but deponent believes that the claim has been paid in full; that suit was not commenced until almost four years after the date of the last item charged against him in the copy filed. All of which the defendant expects to be able to prove upon the trial."

A rule for judgment having been taken against Jesse C. Coulston, for want of a sufficient affidavit of defense, the court, upon the argument of the rule, allowed a supplemental affidavit, which was duly filed and which alleged as follows:

"That the payment of $36.75, made by deponent to plaintiffs, and referred to in his original affidavit of defense, was made upon account of the identical articles included in the copy of book entries filed."

The rule having again come on for argument, the court made the same absolute after allowing the credit of $8.07.

Jesse C. Coulston then took this writ, assigning for error the entry of this judgment without allowing the credit of $36.75.

J. Hazleton Mirkil and *F. Carroll Brewster,* for plaintiff in error.—It was error to give judgment in the face of an averment of a belief and expectation to prove payment of the whole claim. McClure v. Bungham, 1 Troubat & H. Pr. 334.

A defendant is not required, in his affidavit, to make a development of the evidence by which he expects to prove his case. Liebersperger v. Reading Sav. Bank, 30 Pa. 531; Black v. Halstead, 39 Pa. 64; Thompson v. Clark, 56 Pa. 33; Twitchell v.

McMurtrie, 77 Pa. 383; Reznor v. Supplee, 81 Pa. 180; Moore v. Smith, 81 Pa. 182.

The affidavit states positively that the payment of $36.75 was on account of the identical articles sued for. This was directly within the ruling in Selden v. Reliable Sav. & Bldg. Asso. 81* Pa. 336.

The facts in the case of McCracken v. First Reformed Presby. Congregation, 111 Pa. 106, 2 Atl. 94, are entirely dissimilar; and hence that case does not apply.

William Henry Peace, for defendants in error, cited: Markley v. Stevens, 89 Pa. 281; Snyder v. Powers, 37 Phila. Leg. Int. 387; McCracken v. First Reformed Presby. Congregation, 111 Pa. 106, 2 Atl. 94.

PER CURIAM:

The only error alleged in this case is that the court below declined to allow the defendant a credit for the sum of $36.75 referred to in his affidavit of defense. We cannot say, however, that this was error, for the reason that the fact of this alleged payment was not distinctly averred in the affidavit. It is stated evasively instead of directly. No charge of perjury would lie upon such an averment. Aside from this there is no statement of how or at what time such alleged payment was made. For anything that this record shows the averment of payment may be a mere conclusion of law upon facts not stated.

Judgment affirmed.

Girard Point Storage Company, Plff. in Err., *v.* Frederick A. Riehle et al.

A mechanics' lien was filed for scales furnished to a grain elevator. The defense was that the scales did not weigh properly and on that account were rejected. The jury having found that the scales complied with the terms of the contract,—*Held*, that if the scales did their work well, as found by the jury, the defendant was bound to accept them, and the lien attached.

(Argued January 10, 1888. Decided January 23, 1888.)

January Term, 1887, No. 439, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Error

to the Common Pleas No. 4 of Philadelphia County to review a judgment for plaintiffs in an action of scire facias on a mechanics' lien. Affirmed.

A mechanics' lien was filed by Riehle Brothers against a grain elevator of the Girard Point Storage Company, for the value of certain scales for weighing grain, furnished by them under a contract between them and a firm, Malster & Reaney, contractors with the defendant for the erection of the elevator and for furnishing the machinery therein. The defense was that the plaintiffs guaranteed the scales to be in perfect weighing order, and that after numerous tests and a careful consideration of their results, defendant determined that the scales were not fit for the work for which they were constructed, and it therefore had them removed.

Plaintiff introduced testimony to show that the scales were tested before taken to the elevator and were found to be in correct weighing order, and that any inaccuracies were due to the fact that the foundations were not properly constructed. These foundations were built by an independent firm under a contract with Malster & Reaney.

The defendant requested the court to charge, *inter alia,* as follows:

5. If the jury believe that the failure to show accurate results in the weighing tests was due entirely to the defects in the foundations of the scales, the fault was that of an independent contractor, and the defendant is not liable to the plaintiffs for that defect and in this action.

Ans. I must refuse that point. It seems to me that that point would have been better taken by the plaintiffs; that is to say, that the plaintiffs might, in more justice, have said: "If I make good scales, and you or your contractor put in insufficient foundations, I am not to blame for that; and that is a matter of yours and not of mine." But I cannot see that it is a defense against the claim for the scales, that the scales were perfect, but that they did not operate well because of the bad foundations which were put in by defendant's contractor.

Exception. [1]

6. The scales were never accepted by the defendant. Until accepted and finally placed in the defendant's building, the

building is not subject to mechanics' lien, and the verdict must be for the defendant.

Ans. I must refuse that point also

Exception. [2]

The court, THAYER, P. J., charged the jury, substantially, that if they believed that the plaintiffs, in supplying the scales, lived up to their warranty, they were entitled to a verdict. If they did not, the verdict should be for defendant.

Verdict for the plaintiffs for $7,975.61, and judgment thereon.

Defendant took this writ, specifying for error: (1) The answer to the fifth point; and (2) the answer to the sixth point as above noted.

Geo. Tucker Bispham, for plaintiff in error.—Where mechanics furnish material for an erection which is in any degree experimental, and whose acceptance or rejection must depend upon its fitness for the purpose for which it was constructed, it is plain that if the structure turns out to be unfit for the purpose, the owner need not accept it, and this is so even when the fault does not rest upon the material man.

This rule is illustrated by the case of Harlan v. Rand, 27 Pa. 511. See also Kitson v. Crump, 1 W. N. C. 164.

T. B. Stork and *John G. Johnson,* for defendants in error.—This is not a case like that of Harlan v. Rand, 27 Pa. 511, where a subcontractor of a subcontractor who, at best, had only the substitutionary right of the first subcontractor, was held to be liable to the restrictions to which the latter was subject, and to be entitled, under the mechanics' lien law, to no right to file a lien. In that case the heater itself was found to be insufficient for the purposes for which it was intended. No one pretended that if it was fit the owner could, arbitrarily, have rejected it.

The present case is also unlike Kitson v. Crump, 1 W. N. C. 164, where a worthless elevator was erected, not as a part of a new building, but under a contract between the owner of a building already erected and a third person.

In our case a new building was being erected for a purpose which made the placing of these heavy scales therein an absolutely necessary part of the structure. The scales, as the jury have found, were such as were contracted for, and were in proper

weighing order, and were in the condition agreed upon in the separate contract between the owner and their builder. See Odd Fellows' Hall v. Masser, 24 Pa. 507, 64 Am. Dec. 675.

PER CURIAM:

The main question in this case was whether the scales were properly constructed. This was a question of fact and was submitted to the jury in an exceptionally clear and impartial charge by the learned judge of the court below. The jury found in favor of the plaintiffs. This settles the issue of fact. It follows logically that the mechanics' lien attached.

The defendant's sixth point assumes that the scales were never accepted by the defendant. This was a question for the jury. It was contended by the plaintiffs that the scales were accepted. In any event there does not seem to have been any power or authority to reject them arbitrarily. If they were properly constructed and did their work well, as found by the jury, the defendant was bound to accept them, and the lien attached.

Judgment affirmed.

Emily Weaver, Appt., *v.* Martin Reed.

Where one agrees in a pending ejectment suit to pay certain judgments out of the proceeds of the land, the title to the land so recovered will be held by him in trust to pay the judgments.

In the above case, R. agreed to appropriate the proceeds of the land: (1) To the payment of costs, fees, and expenses of recovery; (2) to the payment of a judgment held by himself, and on which he bought the land; and (3) to the payment of judgments held by W. A bill in equity having been filed by W. against R. to enforce this agreement, the master allowed R. credit for a mortgage given by him to his attorney for services in the ejectment suit, and interest on the same, also for $1,200 for other expenses of the ejectment suits, and for $525 for improvements on the land and for the amount of his judgment. He charged R. with the yearly rental of the land since the recovery in the ejectment suits and the amount of W.'s judgments. The court confirmed the master's report and W. took an appeal. *Held*, that there was no error.

(Argued November 7, 1887. Decided January 3, 1888.)

October Term, 1887, No. 242, W. D., before GORDON, Ch. J.,

PAXSON, STERRETT, GREEN, and WILLIAMS, JJ. Appeal from a decree of the Common Pleas No. 2 of Allegheny County, in equity. Affirmed.

Bill in equity, wherein Henry Weaver and Emily Weaver, his wife, in right of his wife, were complainants, and Martin Reed was defendant, with notice to John Barton and A. M. Brown.

The case was referred to Mr. Thomas C. Lazear as master, to state an account, who reported as follows:

All the testimony offered had direct and exclusive relation to the account between the parties, and that account grew out of the agreement of Martin Reed contained in the paper attached to plaintiff's bill of complaint, a copy of which is as follows:

"Pittsburgh, Pa. April 4, 1879.

"I hereby authorize John Barton, my attorney, now conducting an action of ejectment for me against John K. Stewart, No. 412 of October term, 1878, common pleas No. 2 of Allegheny county, that in case of a recovery in said case, to adjust and settle the judgments in favor of Emily Weaver, Nos. 324 and 325 of April term, 1878 (being one of the judgments against said land when sold at sheriff's sale to me), out of the proceeds of said land, said proceeds to be applied, first to payment of costs, fees, and expenses of recovery, then to my judgment on which I sold and purchased the land, then out of the balance the judgment of said Emily Weaver is to be paid.

"Martin Reed.

"Attest: John Barton."

This paper was held by the supreme court in the opinion delivered in said appeal (and to be found in 6 Cent. Rep. 179), to be a valid obligation, supported by a sufficient consideration, binding on Reed and constituting him a trustee for Emily Weaver, of the title to the land therein mentioned, to the extent of the judgments therein recited belonging to her, and which judgments she had previously recovered against Henry Weaver, her husband. This agreement manifestly contemplated a sale of the land in order to carry out its provisions. But no such sale was ever made either by Mr. Barton, who would seem to be

the trustee designated for that purpose, or by Mr. Reed. On the contrary, after the latter had recovered a judgment for the land in the ejectment referred to in said agreement, he entered into possession thereof on or about October 29, 1880, and has continued in possession ever since, treating the property as his own, and wholly ignoring Mrs. Weaver's rights in the premises, until she succeeded in reversing the decree of this court in the aforesaid appeal.

The title to this land was finally decided in favor of Reed on the determination of the second ejectment brought for the same by John K. Stewart against Reed at No. 100, March term, 1881. In the prior ejectment of Reed against Stewart for the land (being the same referred to in said agreement as then pending), Reed also succeeded in recovering a judgment. The final judgment in the second ejectment was recovered on July 23, 1882.

The property, to carry out the provisions of said agreement, should then have been sold or within a reasonable time thereafter; and this might, therefore, have been taken as the proper time at which the accounts between Reed and Mrs. Weaver should be stated; but the counsel for both parties, in the testimony and arguments before the master, preferred to treat the time of hearing as a convenient date for that purpose; and as Reed consented to account for the rental value of the land during the whole period he had possession of the same, Mrs. Weaver has no reason to complain of this mode of adjustment.

The master finds that a fair rental value with which to charge Reed during the six and a half years he has had possession of the farm is $400 per annum, making in all for that period $2,600. Against this, however, he is entitled to set off several items for which he should be allowed in a settlement with Mrs. Weaver. During his occupancy of the farm he made permanent improvements to the same in repairing old fences, erecting new ones, in adding to and repairing some of the buildings on the premises, as well as rendering the soil more productive by the use of fertilizers; and for all these, after deducting the value of some timber he had taken off the place, he should be allowed $500 as a fair estimate of the increased value of the lands in consequence of these betterments.

He also paid taxes amounting in the aggregate to $460, which were a charge on the land, for which he should be allowed.

Another item in dispute, for which he claimed credit as prop-

erly allowable under the said agreement, was for costs and expenses he had incurred in various ways (exclusive of counsel fees) in the litigation he had carried on in respect to said land for the recovery thereof. Without discussing the testimony on this item, the master would merely repeat that, in his judgment, $1,200 is a reasonable allowance for the same.

Mr. Reed also paid interest, amounting in all to $525, on a mortgage he had given to John Barton, Esquire, on the land, to secure his fees for services in conducting the litigation for the recovery thereof, said mortgage being originally for $2,500. This also is a proper item of credit in favor of Reed in his settlement with Mrs. Weaver.

The judgment, also, which Reed held against Henry Weaver, and amounting at the date of the hearing before the master (to which date all the computations in respect to said settlement have been made) to the sum of $1,613.80, he is entitled to be allowed for by the express terms of said agreement.

All the several items above mentioned, including the judgment aforesaid, amount together to $4,308.80. Apply the aforesaid rental value of said farm of $2,600 to the reduction of these items, and a balance of $1,708.80 will still remain due to Reed as between him and Mrs. Weaver, to be paid out of the proceeds of the land before her judgment can be reached in the order of distribution provided for in said agreement.

This balance of $1,708.80 coming to Reed is subject, however, to the payment of the whole, or whatever portion of the costs of this suit, including the master's fee, the court by its final decree in the case may impose on him.

The master, therefore, reports as the result of the whole matter, under the above order of reference, that the defendant, Martin Reed, holds the title to the land in question in trust, to pay out of the proceeds thereof, on the sale thereof, to the several parties entitled thereto by virtue of the aforesaid agreement, in the order and manner following, *viz.:*

1. To the payment of whatever balance may remain to be paid on the aforesaid mortgage of John Barton, Esq., with the interest and costs;

2. To payment of claim of A. M. Brown, Esq., for a bill of $250, which Reed had contracted to pay him for services rendered in the litigation for the recovery of said land, with interest and costs;

3. To the payment of the aforesaid balance of $1,708.80, coming to Reed on settlement between him and Mrs. Weaver, in respect to the items specified in a former part of this report (out of this balance of $1,708.80, however, a sufficient sum to pay whatever amount of costs of this suit the court may impose on him, must first be applied thereto, and then only the remainder thereof is to be paid to Reed);

4. The residue of said fund is to be applied next in order to the judgments of Mrs. Weaver, or such amount thereof as may be sufficient to pay the same with interest and costs—subject, however, to payment out of the same, as part of said judgments, of whatever portion of the costs of the suit this court may decree to be paid by her;

5. The surplus, if any, of said proceeds, after payment of all the foregoing items, should go to Martin Reed.

To the master's report, the following exceptions, *inter alia*, were filed:

The master erred: (2) In giving said Martin Reed credit with permanent improvements alleged to have been made on said farm, "in repairing old fences, erecting new ones, in adding to and repairing some of the buildings on the premises, as well as rendering the soil more productive by the use of fertilizers;" (3) in allowing credit to Martin Reed "for cost and expenses he had incurred in various ways (exclusive of counsel fees) in the litigation he has carried on in respect to said land for the recovery thereof," the sum of $1,200; (4) in charging against said land the mortgage of John Barton from Martin Reed of $2,500; (5) in giving credit to Martin Reed in the sum of $525, being the interest paid by Martin Reed on said mortgage to John Barton or the assignee of said mortgage; (6) in not charging Martin Reed with all the costs of these proceedings in equity; (7) in not allowing said Emily Weaver the sum of $1,100 for timber cut off by Martin Reed from said premises during his occupancy thereof, with which amount Martin Reed should be charged;" and (8) in not charging Martin Reed in favor of Emily Weaver with the judgment of Martin Reed v. John K. Stewart, of No. 81, January term, 1881, for $460.

The court dismissed the exceptions and entered a decree in accordance with the recommendations of the master.

The assignments of error specified: (1-7) The action of the court in dismissing the exceptions to the master's report; and

(8, 9) in entering a decree in accordance with the master's recommendations.

Robb & Fitzsimmons, for appellant.—The rule of law respecting the liability or responsibility of trustees compels an accurate account in favor of the *cestui que trust* and against the trustee. This is upon the principle that the trustee has the estate in hand and must act honestly. His accounts should be reasonably perfect and regularly kept, in order that the *cestui que trust* may be assured upon investigation that his estate has not been mismanaged and squandered. It is, therefore, the well-settled rule that where the "trustees kept very imperfect accounts, or none at all, every intendment of fact is to be made against them." Hart v. Ten Eyck, 2 Johns. Ch. 81–108; *Ex parte* Cassel, 3 Watts, 408.

A trustee who, having assumed and taken upon himself the management of an estate, and instead of managing and preserving the estate for the common benefit of those who might be entitled to it, trumped up an unfounded claim in his own favor against it, by which he attempted to appropriate the whole of it, will not be allowed a claim for his trouble, loss of time, and expenses, as it is inconsistent with every principle of retributive justice that a trustee who betrays the confidence reposed in him and attempts to defraud the *cestui que trust* by appropriating the trust funds to the discharge of a pretended claim of his own should receive the same reward that is due to virtue only, given as a remuneration for services rendered with a view to advance the interests of the *cestui que trust. Re* Swartswalter, 4 Watts, 77.

The duty of a trustee or of an agent in charge of property to keep regular and correct accounts is imperative; if he does not, every presumption of fact is against him. He cannot impose upon his principal or *cestui que trust* the obligation to prove that he has actually received what he might have received, and what it was his duty to endeavor to obtain. By failing to keep and submit accounts he assumes the burden of repelling the presumption and disproving negligence and faithlessness. Landis v. Scott, 32 Pa. 495; Berryhill's Appeal, 35 Pa. 245.

A trustee cannot claim compensation for services self-imposed, and resulting from his own wrong. Stearly's Appeal, 38 Pa. 525.

A trustee or agent cannot generally, as intimated, unite in himself the opposite character of buyer and seller; and if he does so, the *cestui que trust* or principal, unless upon the fullest knowledge of all the facts he elects to confirm the act of the trustee or agent, may repudiate it, or he may charge the profits made by the trustee or agent with an implied trust for his benefit. Parker v. Nickerson, 112 Mass. 195; Bigelow, Fr. 238.

The officers and directors of a corporate body, for example, are trustees of the stockholders, and cannot, without being guilty of fraud, secure to themselves advantages not common to the latter. Thus, where a corporation instructs its officers to effect a loan of money, and they, in violation of their duty, proceeded to secure personal claims of their own against the company, they were held guilty of a fraudulent breach of trust, and the transaction was declared void as against the stockholders. Simons v. Vulcan Oil & Min. Co. 61 Pa. 202, 100 Am. Dec. 628; Koehler v. Black River Falls Iron Co. 2 Black, 715, 17 L. ed. 339; Charitable Corp. v. Sutton, 2 Atk. 404; Jackson v. Ludeling, 21 Wall. 616, 22 L. ed. 492; York & N. M. R. Co. v. Hudson, 19 Eng. L. & Eq. Rep. 361; Ang. & A. Priv. Corp. § 312.

Improvements put by a guardian upon lands fraudulently purchased from the ward are not to be reimbursed; and if put on by him as guardian, without an order of the court, it is at his own risk. Eberts v. Eberts, 55 Pa. 110.

C. S. Fetterman for appellee.

Per Curiam:

Under the decision of this court, the statement of an account between the contestant parties was all that remained to be done. The matter was properly referred to a master, who heard the proofs of the parties and stated an account.

We have examined the report of the master, and agree with the court below: That there is nothing in it which requires correction.

The appeal is dismissed and the decree affirmed, at the costs of the appellant.

Francis E. Brewster's Appeal.

Estate of Priscilla Smethurst, Deceased.

The terms of a will, where there was a shortage of anticipated income, considered.

(Argued January 24, 1888. Decided February 6, 1888.)

January Term, 1888, No. 44, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, and CLARK, JJ. Appeal from a decree of the Orphans' Court of Philadelphia County dismissing exceptions to the adjudication of an executor's account. Affirmed.

Priscilla Smethurst died January 23, 1853, leaving a will by which she provided, *inter alia,* as follows:

"Second. *Item,* All the rest, residue, and remainder of my estate, real, personal, and mixed, whatsoever and wheresoever, I give, devise, and bequeath unto my executors hereinafter named, their heirs, executors, administrators, and assigns forever—in trust nevertheless to, for, and upon the following uses, intents, and purposes, that is to say: To have, take, and receive the rents, income, interest, dividends, and profits thereof, and to pay and apply the sum of $1,000, part thereof, in and towards the maintenance and education of my children, subject to the directions hereinafter given, relative to the same, the said $1,000 to be divided into as many equal parts as I leave children surviving me, and the balance or remainder of the said income to appropriate towards the payment of the principal of all mortgages, ground rents, or other encumbrances whatsoever; and from and immediately after the payment of all encumbrances whatsoever, against my said estate, to invest said balance of income so as to form a part and principal of my said estate, to be

held in trust as herein indicated and set forth. And upon the arrival of my children at full age, then, so far as the shares of my sons are concerned, in trust to pay to my said sons their proportion of the $1,000 until he or they shall arrive at the age of twenty-five years; and at and upon his or their arrival at such age then to pay over, transfer, and assign to said sons his or their full and entire proportion of my estate. And so far as the shares of my daughters are concerned, in trust to have, hold, receive, and take the rents, interest, income, dividends, and profits thereof, and to pay the same to my said daughters for their sole and separate use, free and discharged from the debts, obligations, control, interference, or anticipation of any husband or husbands of my said daughters, or either or any of them, but to receive only their proportion of the $1,000 until she or they arrive at the age of twenty-five years, and from and immediately after the decease of my said daughters or either or any of them to have, hold, pay, and distribute the share of such deceased daughter in such manner and way as she by her last will . . . shall direct. . . . Provided, however, that, in case my said executor shall deem it proper, it shall and may be lawful for them at the arrival of either of my sons at the age of twenty-one years, or between said age and twenty-five, to give and advance to such son or sons a sum of money not exceeding one half of his whole and entire share to set him up in business. And in like manner upon the marriage of either of my said daughters it shall be lawful for my executors, if they deem the same proper, to pay and advance to such daughter a sum of money not exceeding $500 to procure furniture for her; and it shall further be lawful for said executors, if they deem the same proper, to give and advance to such of my daughters as may desire the same after their arrival at full age, and whether married or not, a sum not exceeding, together with such amount as may be advanced for furniture as aforesaid, one half of her whole and entire share. And provided further, that in case either of my sons shall die under the age of twenty-five years leaving issue his part and share shall be equally divided among such issue and should either of my sons die between the ages of twenty-one and twenty-five, either with or without issue surviving him, but leaving a last will and testament, his part or share shall be paid and distributed as directed and set forth in such last will and testament; and in the event of the death of

either or any of my said children during their, his, or her minority, leaving lawful issue, such issue to take only the part or share that his, her, or their deceased parent or parents would have taken if living. . . .

"I desire and request that all my children except William shall be sent to my sister, Margaret, in Manchester, England, to be kept, maintained, educated, and provided for by her during their minority, and direct that portion of my income which I divide between my children to which said minors are entitled to be paid annually by my said executors to my said sister for that purpose; and further that the share of my son William shall contribute and pay $52 per annum to my said sister. In case any of my children shall not desire to remain with my said sister during their minority, then I direct my executors to pay the sum of $52 per annum from the share of such child to my sister during her natural life, my said sister to receive the full proportion of the said $1,000 of such of my children as remain with her until they are respectively twenty-one years of age, and $52 per annum from each of the other shares, for and during the term of her natural life. And I hereby direct my executors in paying the shares coming to my sons to retain from each share a sum sufficient to yield the clear income of $260 per annum to be paid to my sister during all the term of her natural life—including, of course, the share of my son William, the like sum to be paid from the interest and income of each of my daughters' shares, and a like sum retained from each share in every event and upon the death of any of my children to meet such payment, the principal after the decease of my said sister to be deemed and considered as belonging to the son, daughter, or his or her share from whom the same was retained—my object and desire being to provide for my sister an annual payment of $260 per annum out of my estate during all the term of her natural life, and which I hereby direct to be paid to her."

By a codicil she directed that if at any time her sons or daughters should get into difficulties, her executors should have the power to advance what money they should think proper to relieve such sons or daughters.

She left five children: William A. Smethurst, Priscilla M. (now) Vanderford, Robert, Thomas M., and Alice E. Smethurst. William attained full age October 18, 1854; Alice, Sep-

tember 11, 1857; Robert, October 11, 1859; Priscilla, December 11, 1861; and Thomas, October 13, 1864.

Mr. Brewster, as administrator in Pennsylvania of the estate of Margaret Robinson, deceased, who died July 7, 1882, presented a claim under the will, in the sum of $5,191.69, for arrears of annuity given by the will as compensation for the care and tuition of testatrix's minor children.

It was shown that Priscilla remained with the claimant six and a half years; Robert, seven years, and Thomas, eighteen and a half years; and compensation at the rate of $200 per annum from each of them during the respective periods of their stay and $52 per annum during the time they were not under the care of the claimant, up to the time of her death, was demanded. The sum of $52 per year each from Wm. Smethurst and from Alice Smethurst was also included in the claim.

The auditing judge, ASHMAN, found: "That the yearly contribution of $52 from the share of each child, which was directed to be paid to the claimant, was payable from the date of testatrix's death. In express terms the decedent, in ordering that contribution, declared her intent to be to provide for her sister an annuity of $260; and this, under all the authorities, would commence at her death. But the only fixed sum which the claimant took under the will was this annuity. Her compensation for services to the minor children was, in the language of the testatrix, 'the full proportion of the said $1,000 of such of my children as remain with her, until they are respectively twenty-one years of age.' In another part of the will, the testatrix says: 'I direct that portion of my income which I divide between my said children, to which said minors are entitled, to be paid annually by my executors to my said sister.' That portion of the income of her estate was $1,000, and the share of each child therein was $200. But it was payable out of income; and if the income of the estate fell short of the amount, the children could claim only to the extent of the income. It would probably be held that a deficit in one year could be made good by the surplus in a succeeding year. That point, however, does not come up, for the reason that in the twenty-eight years during which some one or more of the children lived with the claimant, the total net income of the estate amounted only to $18,781.13, which was an average yearly sum of

$670.75. The claim will be computed, and, when computed, allowed as follows, and the accountant will reimburse himself out of the future shares of the respective *cestuis que trust:*

"I. The claimant will be allowed $52 per annum, dating from testatrix's death, from the share of each child who did not reside with her; and $52 per annum from the share of each remaining child, for the period during which such child did not reside with her.

"II. She will be allowed $200 per annum during the stay of each child who lived with her, where the yearly income of the estate would permit that payment; where the income would not, she will be allowed a *pro rata* share of $200, to be graded by the actual income of the estate.

"III. Upon the balance which may remain, after deducting from the sum thus found, the payments which were made to the claimant, she will be awarded interest, which will be ascertained by averaging the dates and amounts of the yearly sums due her, and the dates and amount of the moneys received by her on account."

Exceptions filed to the adjudication were dismissed by the court, and the adjudication confirmed.

The court filed the following opinion:

Upon an examination of the second item of the will, it is apparent that testatrix anticipated her estate would yield at least a clear annual income of $1,000. And as she left five children, she directed the trustees to expend that amount for their maintenance and education, in the proportion of $200 for each child. There is no direction that if the net income should not yield $1,000, any deficiency should be supplied, either from the principal or from the income of any succeeding year, should it be in excess thereof. The expense of the education, etc., of the children depended wholly upon the income collected by the trustees. If it amounted to $1,000, then one fifth was to be so expended upon each child; but if less, then a like proportion of the actual net income.

That this is the proper construction of the will, and as placed upon it by the auditing judge, we do not think there can be any doubt; and it is rendered still clearer by its succeeding provisions.

But testatrix also provided for the care and education of her

children, and expenditure of the sum she set apart for these objects. These duties were not committed to the trustees, but she directed that all of her children, except one son, should be sent to her sister in England, to be kept, maintained, educated, and provided for by her during their minority. And she enjoined upon the trustees to pay to the sister the share of the said sum of $1,000, out of the income to which each child, placed in her care, would be entitled, for the purposes mentioned. As four children were to be committed to the care of the sister, she was to receive $800 per annum, and the remaining child, the son, was entitled to his one fifth, in his own right, less $52 per annum, to be deducted from his share and paid to her sister. So that if the net income amounted to $1,000 per annum, the latter would be entitled, during the minority of the four children, to $800, and $52 from the share of the son—in all $852 per annum.

But testatrix also contemplated the unwillingness of some of her children to remain with their aunt. In that event she directed that her sister should receive out of the share of the child or children who declined to reside with her during their minority, the sum of $52 per annum during her natural life, at the same time receiving the share of the income of each child who continued to reside with her until his or her majority.

It will be observed that testatrix directed the deduction of $52 per annum out of the share of her son whom she did not intend to reside with her sister. This sum, it appears, is one fifth part of the annuity of $260, which testatrix intended her sister to receive out of the share of the income to which each of her children would be entitled. The sum of $52 was not to be deducted from the shares of the children who resided with their aunt during their minority. As long as they remained with her, she was entitled to their entire share of the $1,000 income; or, if less than that sum, to their proportionate shares; but, if they declined to live with her, then she was to be paid $52 per annum for life out of their shares of the income.

And finally, testatrix directed the payment of $260 per annum to her sister out of her entire estate, by the provision that when her sons attained twenty-five years of age each should be entitled to his share of her estate, after the setting apart by the executors of a sum sufficient to pay his one fifth part of the annuity, and a like proportion to be deducted from the in-

come of the daughters' share, the principal being held in trust for them for life.

We have thus outlined what appears to us as the scheme of distribution contemplated by testatrix, so far as relates to the account now before us. The result is that the sister of testatrix is entitled to receive from the trustees: First, the shares of the income to which the children were entitled who resided with her during their minority—if it amounted to $1,000 or less, their one fifth part thereof; second, the sum of $52 per annum from the shares of the children who did not reside with her; and third, an annuity of $260 from the income of the entire estate for life.

The annuitant died July 7, 1882; and her administrator is entitled to the arrears of the annuity, with interest, less the payments made by the trustees on account thereof, with interest. A statement of the amount of net income to the death of the annuitant, in accordance with the principles stated, shows that the same amounted to $7,877.18, and the payments made by the trustee amounted to $6,895.56, leaving due the annuitant $981.62. But by averaging the interest upon the amounts of income due, and upon the payments made, in some years largely in excess of the shares of income of the children, and her annuity, the annuitant is found to have been overpaid by the trustees. . . . The exceptions are dismissed.

The assignments of error specified the action of the court: (1) In deciding that, as the income of the estate for several years fell short of $1,000, the deficit in the payment to Mrs. Robinson for annuity and compensation for support of children, caused by such shortage of income, could not be made up from surplus income in succeeding years; (2) in abating the claim of Mrs. Robinson's administrator for the annuity of $260 and compensation for support of testatrix's children during their minority, because in some years there was a deficit of income, although in succeeding years there was surplus income ample to meet the claim; (3) in computing the total claim of Mrs. Robinson at the sum of $7,877.18, instead of $11,296; (4) in not awarding to Mrs. Robinson's administrator the claim upon the basis of $260 per annum for annuity from testatrix's death to the death of the annuitant, and also $148 per annum from the share of income of each child supported during minority by Mrs. Robinson, being $11,-

296, less the amount paid to her on account, $6.895.56, said claim amounting to $4,400.44; (5) in finding that there was nothing due Mrs. Robinson's administrator and in disallowing the claim; (6) in calculating the claim of Mrs. Robinson's estate so as to bring it in debt to the accountant; and (7) in dismissing the exceptions of Mrs. Robinson's administrator to the refusal to allow $4,400.44, being the balance due on the claim for annuity and support of testatrix's minor children.

Francis E. Brewster, appellant, *pro se.*—It is manifest, from an examination of the whole will, that the testatrix intended to make an annual provision for her sister, Mrs. Robinson, which, under no circumstances, should be less than $260 in any year.

Beyond all question, therefore, if the income of the estate had failed every year, the annuitant could have enforced her claim for payment out of the principal. In Swallow v. Swallow, 1 Beav. 432, note; Stamper v. Pickering, 9 Sim. 176, and Green v. Belchier, 1 Atk. 505, where there was a deficiency of annuity, resort was had not only to all the income, but even by sale to the principal.

See also 10 Sim. 596, 1 Sim. & Stu. 463; 2 Jarman, Wills, 535–6; Bootle v. Blundell, 1 Meriv. 233; Foster v. Smith, 2 Younge & C. Ch. Cas. 193; Milner v. Milner, 1 Ves. Sr. 106; 5 Russ. 24; Rudolph's Appeal, 10 Pa. 34; Horton v. Cook, 10 Watts, 124, 36 Am. Dec. 151.

The court below disallowed the full claim for arrears presented by Mrs. Robinson's administrator, because the annuity and allowance for support of children was payable out of the income, which in some years fell short of $1,000. This was clearly erroneous.

By a proper construction of the will the surplus income is properly distributable to the *cestuis que trust* and with them to Mrs. Robinson.

As an annuitant she stood in a better position under the will than the testatrix's children; and as the recipient of the shares of those children who lived with her, in compensation for her services to them, as directed by the will, she certainly stood upon an equal footing with all the children. The surplus income was distributed among them. Why then was not Mrs. Robinson allowed to share in its distribution?

A similar direction by a testatrix for the care and charge of

her children was said in Hewson's Appeal, 13 W. N. C. 231, to be akin to an appointment of a testamentary guardian of their persons, and should be similarly construed, where the court below said (see Cox's Estate, 12 W. N. C. 160) that an annuity or legacy given in payment of services could not be the subject of abatement. See also Gassman's Estate, 10 W. N. C. 275; Wms. Exrs. *1169; Theobald, Wills, p. 459; Heath v. Dendy, 1 Russ. Ch. 543; Norcott v. Gordon, 14 Sim. 258; Reed v. Reed, 9 Watts, 263; Lewin v. Lewin, 2 Ves. Sr. 415; Duncan v. Alt. 3 Penr. & W. 382.

Wm. Henry Lex, for appellee.—There is a case in Pennsylvania which discusses and comments upon the various cases which have a direct bearing upon the question under consideration, and which is clearly in support of the appellee's argument, expressly deciding that in a case like the present, arrears of an annuity arising from deficiency of income in any one year are not to be paid out of the income of subsequent years. Sell's Estate, 4 W. N. C. 14. See also Foster v. Smith, 1 Phill. Ch. 629; Stelfox v. Sugden, Johns. V. C. (Eng.) 234.

Opinion by Mr. Justice Sterrett:

The questions presented by this record were fully considered and correctly decided by the orphans' court. The will in question was rightly construed, and, for reasons given at length in the report of the learned auditing judge, supplemented by the opinion of the court, the decree should be affirmed.

In making provision for the support and maintenance of her five children, testatrix evidently assumed her estate would yield a clear annual income of at least $1,000. So confidently does she appear to have anticipated an annual income of more than that amount, that in the same connection she directed the excess to be applied to "the payment of the principal of all mortgages, ground rents, or other encumbrances" on her estate; and, when these were all paid, the same to be invested and treated as part of the corpus of her estate. This disposition of any excess over $1,000, is an answer to the suggestion that when the income proved to be less than $1,000, the deficit should be made up from the surplus in after years.

If the specific directions of the will, in regard to annual income, are carried out, such a thing as undisposed of or surplus

income could never be possible. It is very evident, therefore, that testatrix never contemplated less than $1,000 net income in any one year, and for that reason made no provision for supplying any possible deficiency.

The necessary result of a proper construction of the will is that testatrix's sister is entitled to receive from the trustees the shares of the income to which the children who resided with her during their minority were entitled, whether those shares amounted to the full sum of $200 each or less, also the sum of $52 per annum from the shares of each of the children who did not reside with her, and lastly an annuity of $260 from the income of the estate, for life.

The basis of settlement adopted by the court being correct, we discover no error in the calculation. The whole subject was so fully considered by the court below that further elaboration is unnecessary. Neither of the specifications of error is sustained.

Decree affirmed and appeal dismissed, at the costs of appellant.

Otto Kramer, Plff. in Err., *v.* Samuel W. Read.

Where the defendant's testimony has been so vague that the trial judge has not been able to understand it, there was no error in refusing to affirm a point predicated upon facts alleged to have been stated in such testimony.

(Argued January 17, 1888. Decided February 6, 1888.)

July Term, 1887, No. 124, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Error to the Common Pleas No. 2 of Philadelphia County to review a judgment in favor of the plaintiff in an action of assumpsit. Affirmed.

This action was brought by Samuel W. Read against Otto Kramer, to recover the balance of purchase money of a house.

The facts as they appeared at the trial before KELL, J., were as follows:

Charles Weiler held a note of Vanuxem, Wharton & Company, for $500 given him for wages. Kramer discounted this note for Weiler and subsequently Vanuxem, Wharton & Company failed.

Kramer then applied to Weiler to secure him and Weiler agreed to sell to him a house over which he had control. This house was in the name of Samuel W. Read, who was trustee for Weiler's wife. The purchase money agreed upon was $7,500. It was agreed that there was to be an allowance for repairs of $70 according to the plaintiff's statement, but of $157 according to the defendant. At the coveyancer's office a statement was made out between Read and Kramer, the last item of which was: "Balance due Read $935.37;" of this balance $300 was subsequently paid, and for the remainder this suit was brought. Kramer succeeded in collecting the full amount of the note. The defendant claimed that his agreement with Weiler was that this note should be retained by himself; and if he succeeded in collecting it, he should not have to account to Weiler or Read for the proceeds. The defendant's whole testimony as given in the paper book was as follows:

"Weiler said, "Go to an architect and make an estimate,' and this was $157 and over. 'You buy the house for $7,500, you keep the note.' The $500 which Weiler owed me was to make up part of the $935, and then I was to have the note."

The defendant presented this point:

"If the jury believe the defendant's story, *viz.*, that the plaintiff agreed to pay the costs of the repairs, and that the cost was $157, and the defendant was to have the Vanuxem note as part of the consideration to him in the transaction, their verdict should be for the defendant."

Ans. Refused.

The court in the charge said, in speaking of defendant's testimony: "I cannot say that I understand it at all."

The verdict and judgment were for plaintiff, for $515.57.

The assignment of error specified the refusal of defendant's point as above.

Leoni Melick, for plaintiff in error.—If a point be submitted, based upon a hypothesis supported by actual testimony in the cause, the party has a clear right to a definite instruction thereon. Allegheny Valley R. Co. v. Steele, 11 W. N. C. 113; Pennsylvania R. Co. v. Zebe, 33 Pa. 323.

Although the testimony of a witness be vague, it cannot be withdrawn from the jury. Norton v. Breitenbach, 1 Pearson (Pa.) 467.

Edward F. Hoffman, for defendant in error.—Where a proper answer to a point presented would be negative, the plaintiff in error cannot complain of the refusal or neglect of the court below to answer the point. Winsor v. Maddock, 64 Pa. 235.

PER CURIAM:
The judgment in this case is affirmed.

Daniel R. Kelly's Appeal.

A, a construction company, agreed to build a road for a railroad company and accept payment in bonds; A subsequently assigned its contract to B, an independent contractor, agreeing to secure for him, *inter alia,* rights of way. The railroad ratified this assignment and deposited a certain amount of bonds with a trust company, as security for B until his work was completed; it was stipulated, however, that these bonds would not be issued to B until certain bonds of a prior mortgage were paid by A. B worked on the construction until A failed to secure the right of way as agreed. A also failed to pay off the prior bonds, and the road was sold under the mortgage given to secure these bonds. The auditor appointed to distribute the fund arising from this sale, after paying the amount of the first mortgage bonds, distributed the balance *pro rata* among the holders of a certain number of the new bonds, under a modification of the terms of the agreement under which they were deposited, to which B was a party. B presented a claim to the auditor for bonds equivalent to the amount of work done. *Held,* that A having failed to pay off the first, B was not entitled to claim any new bonds; that B's remedy, if any, was against A.

(Argued January 13, 1888. Decided January 23, 1888.)

July Term, 1887, No. 64, E. D., before PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Appeal from a decree of the Common Pleas No. 1 of Philadelphia County dismissing the exceptions to an auditor's report, disallowing a claim of D. R. Kelly, a contractor. Affirmed.

The facts of the case are substantially as follows: The Chester Construction Company contracted with the Philadelphia & Chester County Railroad Company, in consideration of a certain amount of stocks and bonds, to construct its road from Philadelphia to Chester; it was further provided in said contract that no payment should be made by the railroad company "until after all the outstanding 7 per cent bonds of the issue of

February 1, 1879, should be redeemed and the mortgage securing the payment of the same should be satisfied."

January 19, 1883, the construction company made a contract with D. R. Kelly, by which he was to construct the road; subsequently this contract was approved by the railroad company. By the terms of this contract it was agreed that the construction company would deposit with the Guarantee Trust & Deposit Company of Philadelphia, *inter alia,* $500,000 of the first mortgage 6 per cent bonds of said Philadelphia & Chester Railroad Company, "to be held for the security of the contractor until the work of building the road should be completed."

The construction company further agreed to furnish the contractor with all rights of way for the construction of said road and to hold him harmless from any damages.

The bonds were subsequently deposited with the trust company and an agreement was signed by all the parties, which is set forth in the auditor's report, *infra.*

Under this agreement it was the duty of the construction company to pay off the $13,000 mortgages.

Work was begun by Kelly in March, 1883, and continued until June, when it ceased because he was not furnished with money or bonds or right of way.

Subsequently, both the construction company and the railroad company became insolvent and released each other from all claims.

The trust company, at the request of the holders of over 60 per cent of the 7 per cent bonds, filed a bill asking the court to decree a sale of the mortgaged road by reason of a default in the payment of the interest. The property and franchises of the railroad company were sold in accordance with a decree to that effect, and the trustee filed an account showing a balance in his hands, after paying all costs, of $36,661.25, which was referred to an auditor for distribution.

Before the auditor Kelly presented a claim for a portion of the bonds in the hands of the trust company, equal in amount to the work performed for the construction company.

The auditor disallowed this claim, filing the following report:

The contention of Mr. Kelly and his assignees is that he entered upon the performance of his work under the contract the construction company made with the railroad company, and

which had been assigned to him, and continued to perform his contract until forced to suspend operations by reason of the inability on his part to receive payment as provided in the contract. He claims, therefore, to be entitled to the following amount:

Monthly estimates of chief engineer, for March and April, 1883		$40,476 10
Estimates for May, 1883, and to June 25, 1883, per copy produced		26,000 00
		$66,476 10
Credit.		
Cash from construction company	$5,400	
Cash from Faulkner	4,076	
		9,476 00
		$57,000 10
26 bonds, 6 per cent, at 50 per cent		13,000 00
Balance due		$44,000 10

—or 88 bonds at 50 per cent, per contract.

A dividend is claimed upon 88 bonds of $1,000 each.

In 1883 certain bonds of the par value of $500,000 were deposited by the Philadelphia & Chester County Railroad Company with the Guarantee Trust & Safe Deposit Company, under certain conditions set out in the agreement entered into by the Chester Construction Company, Daniel R. Kelly, and the Philadelphia & Chester County Railroad Company. That agreement provided for the delivery of these bonds under certain conditions. One of these conditions was:

"That it is distinctly understood and agreed by and between the parties to this agreement that there is still outstanding $13,000 in first mortgage bonds issued under a preceding mortgage to that under which the bonds deposited as herein stated were issued, which are to be redeemed, turned over to the said Guarantee Trust & Safe Deposit Company, trustee of the mortgage covering the same, and the said mortgage satisfied of record, before any part of said deposited $500,000 in bonds is paid over or delivered to the said Daniel R. Kelly, or to anyone in his behalf."

The interest of Mr. Kelly under that contract has been made

the basis of the claim here. His right to claim here must be either upon an actual delivery to him of bonds or the right established to demand delivery.

The deposit was made by the railroad company, according to the terms of the contract. The bonds were subject to the order of Mr. Kelly upon the performance of certain conditions by the Chester Construction Company. If they were not performed, his remedy was against that company. It was one of the elements of the general contract, between Mr. Kelly, the construction company, and the railroad company, that before the bonds could be delivered, a prior mortgage should be satisfied of record. It was the construction company that was to secure those interests. The trustee held the bonds, upon the condition, and had no right to deliver them so as to pass any ownership in them to Mr. Kelly until the condition had been performed. The bonds, therefore, were never constructively or actually the property of the Chester Construction Company or Mr. Kelly.

The railroad company was subsequently sold with these bonds undelivered, and at the time of sale, no right established against it by Mr. Kelly.

By the sale it became impossible for the construction company to perform its part of the contract, and its right to any bonds disappeared. The right of Mr. Kelly to the bonds was determined at the same moment, because he could only obtain them through the performance by the construction company of its contract. His remedy is against the construction company for any wrong that he has suffered from its acts.

The railroad company has not failed in any of its obligations, but the construction company has; and Mr. Kelly's right to any bonds being dependent upon the conditional acts which were not performed and cannot be performed by the construction company, no right remained in Mr. Kelly to enforce any claim for bonds against the railroad company. No right to demand delivery has been shown; Mr. Kelly has no claim then, either against the railroad company or its specific bonds, which can now or can hereafter be made enforceable.

The modification agreement, and the delivery to the company of 50,000 bonds for certain parties, does not alter the force of the principles laid down, nor disturb the binding character of the agreement upon the bonds which remained in the hands of

the trustee. Mr. Kelly was a party to the modification, and obtained benefits from it, and was bound by it.

The railroad company appears to have carefully guarded against rendering itself liable to pay out its bonds without securing an equivalent in work; and your auditor cannot find through all the testimony a waiver or anything tantamount to a waiver on its part of the performance of the condition on the part of the construction company and Kelly, that the $13,000 outstanding 7 per cent bonds should be retired. The principal men in the railroad company were largely interested in its completion, and appear to have been willing to and did assist in various ways in aiding the construction company and Kelly in performing their contract; but they likewise appear to have been just as cautious in not officially committing themselves to do more than their contracts called for. Your auditor so views, for instance, their action in releasing $50,000 of the $500,000 bonds deposited with the Guarantee Trust Company and their efforts to assist in obtaining the rights of way; they neither waived nor decreased any rights of their own, nor enlarged those of Mr. Kelly or the construction company, nor released them from any of their obligations.

Your auditor cannot reform or amend the contracts these parties solemnly made; and he must pass upon them as he finds them. He is of opinion that neither Mr. Kelly nor any assignee of his has any right to any of the bonds whether considered issued or not issued by the railroad company, now held by the Guarantee Trust Company, and all said claims are disallowed.

The entire fund was awarded to the holders of the 7 per cent bonds and to the holders of the coupons of the 6 per cent bonds.

To this report Kelly filed the following exceptions:

1. Because the learned auditor erroneously found that all the bonds under the modified agreement of May 16, 1883, had been paid over, when in fact but fifty bonds had been withdrawn, thirty-four of which were given to the railroad company and retained by it;

2. Because the learned auditor erred in holding that by the agreement of the 16th day of May, 1883, Kelly was debarred the right to claim upon the bonds which had been deposited with the trust company and delivered as security for the work performed and materials furnished by claimant;

3. Because the learned auditor erred in holding that the sum of $13,000 referred to in the agreement of the 16th day of May, 1883, was not the obligation of the railroad company, when in fact it was the balance of the first mortgage 7 per cent bonds issued by the railroad company, the first lien upon the road, and paid out of the fund in court for distribution;

4. Because the learned auditor erred in not holding that the claim of Kelly was only postponed by the agreement of the 16th day of May, 1883, the bonds having been issued and delivered for the security of the contractor and the work performed in accordance with the contracts;

5. Because the learned auditor erred in not holding that the conditions of the agreement of January 19, 1883, had been waived by the parties thereto, the railroad company and the construction company having mutually released each other from all claims of every kind by releases, dated the 25th day of June, 1884;

6. Because the learned auditor erred in holding that the railroad company had not failed in any of the obligations, and that the bonds deposited were neither constructively nor actually the property of the contractor, Kelly;

7. Because the learned auditor erred in disallowing the claim of D. R. Kelly, contractor.

The court dismissed these exceptions and after a modification of the report, that is not material in this case, entered a decree in accordance with the auditor's opinion.

Kelly appealed, assigning for error the dismissal of the exceptions, and the decree of the court.

Thomas W. Barlow and *Charles C. Lister*, for appellant.—The fund for distribution resulted entirely from the work and labor done and the material furnished by the contractor; and, as the proceeding was an equitable one, the contractor's right to share the products of his own labor rests upon substantial grounds. The bonds only acquired a value from his efforts and the expenditure of his money. It matters not whether he could have pursued his remedy in another county; it does not affect his right. The road being wiped out of existence, it was impossible for him to proceed. Shamokin Valley & P. R. Co. v. Malone, 85 Pa. 25.

The assets of an insolvent corporation are a fund for the pay-

ment of its debts; and a court of equity will enforce this trust in favor of creditors, against the holders of such assets. Id.

The Guarantee Trust Company had no interest whatever in the securities so deposited and delivered for Kelly's security.

The trustees are not to be regarded as agents of the purchasers of the bonds and mortgages assigned to them. No consideration proceeds from them. They were mere assignees of those securities, coupled with no interest, in trust, to hold them as security for the payment of all the mortgage bonds that should thereafter be sold or negotiated by the company. Whoever purchased the mortgage bonds became purchasers of the bonds and mortgages so assigned as security for their payment, or of an equitable right to hold them as security. Johnson County v. Thayer, 94 U. S. 631, 24 L. ed. 133.

J. Levering Jones and *George L. Crawford,* for appellees, relied upon the report of the auditor.

PER CURIAM:

The appellant has failed to convince us that the decree of the court below was erroneous. The bonds upon which he claimed a dividend were never delivered to him, nor was he at any time entitled to demand their delivery. This appears so clearly from the report of the learned auditor that we may well be excused from adding anything to what he has said.

Decree affirmed and the appeal dismissed, at the costs of the appellant.

James Mooney, Plff. in Err., *v.* William H. Reynolds et al.

Same *v.* Albert L. Helmbold.

In an action to recover rent due upon a lease of hotel property, an affidavit of defense is sufficient to prevent judgment *pro tanto*, which avers that the tenant paid, at the plaintiff's request, for board of plaintiff and his family at said hotel a certain sum of money, and also paid a further sum, and assumed and promised to pay other additional sums, for repairs to the hotel, which bills were paid and contracted by the order and direction of

the plaintiff, and which repairs were required to be done by the plaintiff to enable the hotel to be properly carried on.

The above affidavit of defense is sufficient whether the action is against the tenant or his surety.

(Argued January 18, 1888. Decided February 6, 1888.)

July Term, 1887, Nos. 153, 154, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Writs of error to Common Pleas No. 1 of Philadelphia County to review the refusal of an entry of judgment for want of a sufficient affidavit of defense. Affirmed.

These were two actions brought by James Mooney, landlord, against, in the first case, William H. Reynolds and William Neil, trading as Reynolds & Neil, his tenants, and in the second, Albert L. Helmbold, their surety, to recover rent due upon a lease.

The facts were as follows:

James Mooney, the plaintiff in error, is the owner of the New Columbia Hotel, at Cape May, New Jersey. By agreement of lease in writing, dated May 22, 1886, said premises were let by him to Reynolds & Neil, for the term of one year from May 1, 1886, at the rental of $7,000 for said term, payable as follows: $2,000 payable on July 20, 1886, $2,000 on August 5, 1886, $1,000 on August 12, 1886, $2,000 on August 20, 1886.

Albert L. Helmbold, the defendant, was the surety for said lessees.

The lessees paid in cash the rent due July 20 ($2,000), and August 5, 1886 ($2,000), and one half of the rent due August 12, 1886 ($500). The balance of the rent, $2,500, and a gas bill of $378.61 remain due, owing and unpaid to plaintiff; and to recover the same ($2,878.61), plaintiff in error brought this action in covenant against the defendant, as surety for Reynolds & Neil, the lessees.

The lease contained the following clause:

"That the lessor will immediately have repaired and placed in complete order the lawn and lawn fence on said premises, have all the walls plastered, calcimined, and whitewashed where necessary, have the engine put in running order, have all the furniture on the premises which may now be damaged placed in good condition forthwith, have all necessary gas fixtures fur-

nished and hung, have billiard tables and complete fixtures therefor set up on said premises, have the carpets on said premises cleaned where necessary, and furnish the lessees a complete outfit of crockery, china, and glass ware, for the running of said hotel; the same to be returned in good order and condition to the lessor, by the lessees, at the termination of this lease."

The tenants filed an affidavit of defense as follows:

The claim in suit is for rent of the New Columbia Hotel, at Cape May, in the state of New Jersey, amounting to $7,000. Of this sum, defendants paid to plaintiff in cash the sum of $4,500.

Deponents also paid in addition, at the instance and request of plaintiff, for board of plaintiff and his family at said hotel during the summer of 1886, and for repairing and placing in order the said hotel and the lawn thereof, and the lawn fence and the furniture, engine, and billiard tables of said hotel, the sum of $800; and defendants also assumed and promised to pay additional bills for similar purposes, amounting to $400. All of these payments and all of these bills contracted, amounting together to $1,200, were paid and contracted by the order and direction of said plaintiff and to cover those things which were requisite to be done by him to enable the said hotel to be properly carried on.

A supplemental affidavit of defense filed merely furnishes a list of the bills referred to in the original affidavit, with dates, names, and amounts.

The surety defendant filed a similar affidavit of defense in which it was further averred that the repairs made were necessary under the above clause in the lease.

In both cases the plaintiff entered a rule for judgment for want of a sufficient affidavit of defense, but this judgment was refused, and the rule discharged.

The assignments of error specified: (1) The refusal of the judgment; and (2) the discharging the rule therefor.

Joseph P. McCullen, for plaintiff in error.—The affidavits are insufficient, because:

1. The payments are not averred to have been made and accepted on account of the rent sued for, which is necessary. Selden v. Reliable Sav. & Bldg. Asso. 81* Pa. 336; Green v. Storm, 3 Sandf. Ch. 305; Hill v. Austin, 19 Ark. 230; McGill v. Ott, 10 Lea, 149.

2. There is no formal claim to set off these payments, and the facts and circumstances are not sufficiently stated. These payments are not alleged to be now due by plaintiff to defendant. Louchheim v. Becker, 3 W. N. C. 449.

3. The bills defendants "assumed and promised to pay" cannot be set off. Henderson v. Lewis, 9 Serg. & R. 383, 11 Am. Dec. 733.

4. It is necessary that the affidavit should aver that plaintiff failed to make the repairs required by the lease. The landlord is not ordinarily required to make repairs. Kline v. Jacobs, 68 Pa. 57; Hitner v. Ege, 23 Pa. 305.

If not bound to repair by the lease, his promise to repair is without consideration. Libbey v. Tolford, 48 Me. 316, 77 Am. Dec. 229; Proctor v. Keith, 12 B. Mon. 252; Gottsberger v. Radway, 2 Hilt. 342.

5. In the absence of above averments, every intendment is against the defendants. Comly v. Bryan, 5 Whart. 265; Bardsley v. Delp, 88 Pa. 421.

6. A surety cannot set off a claim belonging to his principal. Waterman, Set-Off, p. 57, § 54; Gillespie v. Torrance, 25 N. Y. 311, 82 Am. Dec. 355; Graff v. Kahn, 18 Ill. App. 485; Baltimore & O. R. Co. v. Bitner, 15 W. Va. 455, 36 Am. Rep. 820; Henry v. Daley, 17 Hun, 210; Lasher v. Williamson, 55 N. Y. 619; Morgan v. Smith, 7 Hun, 244; Lewis v. McMillen, 41 Barb. 420; Jones v. Blair, 57 Ala. 457.

E. Cooper Shapley, for defendants in error in both cases.—The defense set up is not a set-off but a payment, which both tenant and surety can plead. Avery v. Brown, 31 Conn. 398; Com. v. Clarkson, 1 Rawle, 293; Roper v. Bumford, 3 Taunt. 76; Waterman, Set-Off, §§ 2, 3, 6; Adams, Eq. 222.

PER CURIAM:

The judgments in the two above-named cases are affirmed.

John Kelly, Plff. in Err., *v.* Manayunk & Roxborough Incline Plane & Railway Company.

The grade of a city street was changed by the city authorities. The roadbed of the street was raised. A railway company's track bounded the street on one side. The company raised its tracks by putting them on sleepers or

ties of the new elevation. Before the spaces between these ties had been filled in, a workman engaged in rolling the roadbed of the street slipped on the street, and fell into one of the spaces between these ties. The roller tilted from the street, was caught between the sleepers, and the workman was injured in consequence of the roller falling upon him. When the workman fell he was walking backward, down hill, keeping to the right of the road. In an action for damages brought by the workman against the railway company, *Held*,

(*a*) That it was not error for the court to instruct the jury that they should consider whether this depression between the tracks was the cause of the accident or whether or not it really did protect the plaintiff from receiving greater injury, in having the roller go over him;

(*b*) That the accident was caused by the negligence of the plaintiff himself, and the defendant company could not, under the evidence, be held responsible therefor.

(Argued January 25, 1888. Decided February 20, 1888.)

January Term, 1888, No. 20, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Error to Common Pleas No. 2 of Philadelphia County to review a judgment entered on a verdict for the defendant in an action on the case. Affirmed.

This was an action brought by John Kelly against the Manayunk & Roxborough Incline Plane & Railway Company to recover damages for injuries to the plaintiff caused by the alleged negligence of the defendant company.

The facts of the case were as follows:

On the 5th of August, 1884, plaintiff was leading a pair of horses attached to a heavy roller down a grade on Ridge avenue, in Philadelphia, between Terrace and Dawson streets, to finish the roadbed of macadam. The avenue had been macadamized some time before, and the work had been carried directly up to the railway of the company. This railway bounded the avenue on the west. Plaintiff was in the employ of the contractor, and had been ordered to roll the bed right up to and alongside of the railway. The grade there was about 3 feet to the 100, and he was going down hill, in keeping to the right, according to the law of the road. The roller and horses were thus taken along the edge of the company's road.

The grade of Ridge avenue had been changed by the city authorities, and at the place of the accident, and beyond on either

side, the roadbed had been elevated, or built up. The railway company was bound to raise its tracks, so as to make them and the bed between them conform with the level of the avenue; and it had, in fact, done part of the work. The tracks had been put on sleepers or ties, of the new elevation, but the spaces between these had not yet been filled in. Thus holes of from 10 to 12 inches in depth were left in the roadway, directly at the place where Kelly was managing his roller. He had one horse by the head, and his other hand was grasping the end of the pole; his companion, in like manner, had the other horse by the head, and his other hand grasped the end of the pole from the other side. Kelly was farthest from the railroad tracks.

As to the manner of the accident Kelly testified: "I was going down hill, and the horse stumbled on account of the railway roadbed not being filled up; and I slipped and jumped up again, and then slipped again; and the second time I slipped and could not get up so well, and I could not get out of the road, and the roller fastened my leg, and I could not get out until they lifted me out." He was pinned by the roller, that fell over and into the hole.

The evidence showed that he was facing the horses, and walking backward on the turnpike, when he stumbled and fell. In trying to regain his feet he slipped or rolled some 5 or 6 feet in the turnpike and into one of these holes in the roadway of defendant company. In some manner the roller was drawn toward the railroad, tilted from the turnpike, and was caught between the sleepers and against the plaintiff's leg, causing the injuries for which this suit was brought. The defendant knew the condition of its roadway. The avenue had been completed six months before the accident. No testimony was exhibited on the part of the defendant, and there was no dispute as to the facts.

MITCHELL, J., at the trial in charging the jury said, *inter alia:* "In reference to the opening between the tracks it is for you to consider whether these inequalities caused the accident or really did not contribute to save him from a greater injury than if the roller had passed over him while lying on a level surface."

The defendant submitted, *inter alia,* the following points:

3. The undisputed evidence is that the plaintiff stumbled and fell upon the turnpike, not from any cause or omission of the defendant contributing thereto; that in the effort to regain his

footing he rolled from the turnpike and into the inequalities of the defendant's roadbed; and that either because the horses hauling the roller (which the plaintiff was leading when he fell) were so pulled or left without proper control, they swerved towards the roadbed of the defendant, dragging into it the roller and pulling it upon the plaintiff. Consequently it is obvious that the inequalities of the defendant's roadbed were not the proximate cause of the accident, and I direct you to find a verdict for the defendant.

Ans. I cannot affirm that as a legal consequence, but leave it to the jury to say, if from the evidence you find the facts to be that the plaintiff's own negligence contributed to the accident, and more especially that the accident would have happened anyhow whether there was or was not this inequality in the road, and if the plaintiff stumbled and fell on the turnpike and rolled over into the roadway, you should consider these facts as determining whether this accident was caused by the opening in the roadway of defendant or whether, in point of fact, the then condition of the roadway saved him from greater injury. In reference to the opening between the tracks, it is for you to consider whether these inequalities caused the accident or really did not contribute to save him from a greater injury than if the roller had passed over him while lying on a level surface. [1]

4. There is no evidence that the unsafe condition of the defendant's roadbed caused the plaintiff to stumble and fall. The uncontradicted evidence is that it did not; that he stumbled and fell on the turnpike over which the defendant had no control, and there can be no recovery by him against it.

Ans. I refuse to affirm that as a binding direction of law; but, as I said before, it is a question for you to consider whether this depression between the tracks was the cause of the accident, or whether or not it really did protect him from receiving greater injury, in having the roller go over him. [2]

5. There is absolutely no dispute about the facts which tend to prove the defendant's alleged negligence, neither any doubt as to the just inferences from them. These facts are that without anything done or omitted by the defendant, leading thereto, the plaintiff stumbled upon the turnpike (which was not under the defendant's control) where he was at work and while leading one of his horses; that he fell upon the turnpike, rolled in front of his horses from the turnpike, and upon the uneven sur-

face of the adjoining roadbed of the defendant; that the horses swerved towards the defendant's roadbed and dragged the roller, which they were hauling, into it, where it ran against and injured the plaintiff. The stumble and fall are therefore purely acts of the plaintiff's negligence; they contributed directly to his injury and prevent his recovery in this suit, and I direct you to find a verdict for the defendant.

Ans. As I said before, I cannot say to you as a binding point of law that that is so; but if you find the facts to be as set forth, then it was the plaintiff's own negligence that caused the accident. [3]

6. No matter how unsafe you find the condition of the defendant's roadbed to have been for traveling, if the plaintiff saw its condition, and he has testified that he did, your verdict should be for the defendant, if you find that the accident could have been avoided by the exercise of ordinary skill by the plaintiff in rolling up hill that part of the turnpike nearest the defendant's tracks, and in rolling down hill that part of it farthest from the defendant's tracks.

Ans. I affirm that point. If you find that in the exercise of ordinary skill and prudence—that due care which a man ought to take—that the plaintiff should have gone up that side of the road nearest the tracks of the defendant, and down on the side of the road farthest from the tracks, knowing that that would be the safer way to do it, and he did not do it, then the accident would be due to the plaintiff's own negligence, and he cannot recover for these injuries. [4]

Verdict and judgment for defendant.

The assignments of error specified: (1–4) The answers to defendant's points.

Edward Hough and *Wm. W. Wiltbank,* for plaintiff in error. —The answers of the court were erroneous in this, that they suggested that, independently of any question of negligence in the actual injury wrought, if the injury might have been greater under other circumstances, the plaintiff was not entitled to recover. Egbert v. Payne, 1 Pennyp. 350; Sartwell v. Wilcox, 20 Pa. 117; Stouffer v. Latshaw, 2 Watts, 165, 27 Am. Dec. 297; Newbaker v. Alricks, 5 Watts, 183; Whitehill v. Wilson, 3 Penr. & W. 405, 24 Am. Dec. 326; Calvert v. Good, 95 Pa. 65.

Samuel Wagner and *E. Hunn Hanson,* for defendant in er-

ror.—The question in this case was one of proximate and remote cause. The answers to defendant's points were, therefore, more favorable to the plaintiff than he was entitled to. No state of facts not in evidence was suggested by the judge below.

The court should have given a binding instruction to find for the defendant. Hoag v. Lake Shore & M. S. R. Co. 85 Pa. 293, 27 Am. Rep. 653; West Mahanoy Twp. v. Watson, 112 Pa. 574, 56 Am. Rep. 336, 3 Atl. 866; South Side Pass. R. Co. v. Trich, 117 Pa. 390, 2 Am. St. Rep. 672, 11 Atl. 627.

PER CURIAM:

This is so clear a case of an endeavor to impute to the defendant an accident with which it was not chargeable that the plaintiff's evidence is alone sufficient to defeat his case, and to render extended comment unnecessary.

The judgment is affirmed.

Appeal of Lucy Dundas et al.

James Dundas' Estate.

The case of an executor purchasing at his own sale is one which addresses itself to the sound discretion of the orphans' court, and where that discretion has been lawfully exercised the supreme court will not revise it.

(Argued January 20, 1888. Decided February 20, 1888.)

January Term, 1888, No. 8, E. D., before GORDON, Ch. J., PAXSON, STERRETT, GREEN, CLARK, and WILLIAMS, JJ. Appeal from decrees of the Orphans' Court of Philadelphia County upon the reports of a master appointed to conduct certain sales of real estate. Affirmed.

The facts appeared from the record as follows:

James Dundas died July 4, 1865, leaving a will by which he directed that the residue of his estate, both real and personal, should be divided into forty equal parts, of which he gave

to his grandnephew, James Dundas Lippincott, sixteen shares, to his grandniece, Anna Maria Dundas, twelve shares, to his niece, Mrs. Agnes Dundas Lippincott, three shares, to the children of his deceased brother, William H. Dundas, five shares, to the children of his brother John Dundas, two shares, and to the children of his deceased brother, Henry T. Dundas, two shares—the child or children of a deceased parent to take the share that the parent would have taken if living.

In the fourteenth item of his will he gave to his executors full power and authority to sell at public or private sale, the whole or any part of his estate, real and personal, without application to the orphans' court, or to any other court, either for the purpose of effecting the sale or division of any lands "that I may own in Schuylkill county, or for the purpose of carrying out this, my will." He appointed Joshua Lippincott, Richard Smethurst, and James Dundas Lippincott the executors of his will. Richard Smethurst died April 18, 1867, and Joshua Lippincott died October 30, 1880.

March 17, 1883, James Dundas Lippincott, the sole surviving executor, presented his petition to the orphans' court of Philadelphia county, setting forth that under the powers contained in the will he was about to sell decedent's real estate at public sale; that he was desirous of becoming a bidder at the sale for the purpose of protecting his interest in the property, which he was advised he could not do without leave of court, and prayed for leave to bid at such sale, and for the appointment of a master to conduct the same and that due notice be given to all parties interested therein.

The court granted the prayer of the petition and appointed Henry C. Olmstead master to conduct the sales, notice to be given to parties in interest as set forth in the petition. The master gave notice to the parties intrusted and after advertisement in the public papers the sale was made June 6, 1883. The Passyunk farm, a tract of 145 acres in the lower portion of the city of Philadelphia, was sold in bulk to the executor; certain tracts of coal land in Schuylkill county, known together as parcel No. 2, and consisting of the Oak Hill, Mine Hill, and Theophilus Hughes' track, remained unsold for want of a bidder; another portion of the coal lands, known as parcel No. 5, or Sharp Mountain tract, was sold to the executor at his bid of $10 an acre. These sales were objected to, principally on the ground of inadequacy of price.

The case was referred back to the master, who filed a second report setting forth that the parties had agreed that the sales which had been objected to should be set aside, and a resale ordered. The court accordingly made an order for the resale of the Passyunk farm and parcels No. 2 and No. 5 of the coal lands.

Prior to the second sale, a mass of testimony was offered on behalf of Lucy Dundas and other parties interested, for the purpose of showing that the Passyunk farm could be sold to better advantage in parcels than in bulk; and it was finally arranged that it should be divided into six different parcels. One of these tracts, known as parcel No. 1, adjoined the land of Adam W. Louth. He had offered before the master $5,000 for this parcel, and it was finally sold to him at that price at the second sale on February 20, 1884.

At this sale tracts Nos. 2, 3, 4, 5, and 6, of the Passyunk farm and parcels Nos. 2 and 5 of the coal lands were sold to the executor. The sales of tract No. 1 of the farm to Louth and of tract No. 6 of the farm to the executor for $23,200 were confirmed without objection; the sales of the remaining parcels were objected to by appellants as having been sold for less than half of their value. Tract No. 2 of the farm brought $3,100; tract No. 3, with the farm-house and buildings thereon, $16,100; tract No. 4, $9,100; tract No. 5, $9,700; parcel No. 2 of the coal lands sold for $60 an acre, and parcel No. 5 for $16 an acre.

The master reported these sales on May 3, 1884, and upon petition of Lucy Dundas, this report was referred back to the master, with instructions to take testimony and report back to the court.

In accordance with the order the master took testimony and filed a fourth report, which contained, *inter alia,* the following:

"Under all the evidence, the master reports that although some of the tracts of the Passyunk farm were purchased cheaply, they brought as much as could reasonably be expected at public sale; and there is no such inadequacy of price as would justify the setting aside of the sale. The exceptions to the confirmation of the sale of tracts Nos. 2, 3, 4, and 5, of the Passyunk farm should, therefore, be dismissed, and the sale confirmed.

"As to the coal land. Prior to this notice (that a fire had

broken out in the working and was extending) counsel for the exceptants had offered, if the property was put up again at public sale, to produce a bidder who would bid $70 an acre for the tract—the selling price having been $60. When the circumstance of the fire was made known the offer to bid was at once withdrawn.

"Had the offer of $70 an acre been allowed to stand, the master would have reported in favor of setting aside the sale, as an advance of over $6,000 would have been obtained in the price; but in view of the withdrawal of this offer and of the fact that the estimates of experts vary so widely as to give the impression that they must be almost guesses, the master has arrived at the conclusion that the price brought at the public sale, which was the second time the property had been put up, is the best evidence of value, and that the sale of parcel No. 2 should be confirmed.

"The question of costs has been raised several times in this case by counsel; and the master reports thereon that he does not think it fair or just to charge the estate with the whole of the costs, since the objections to the confirmation of the sales of February 20, 1884, were filed.

"The exceptants have succeeded before the master in having only one of their objections sustained, namely: that to the confirmation of the sale of parcel No. 5 of the coal lands—and that for a reason that was not laid before the master until February 24, 1885, more than a year after the sale was made. In the meantime this litigation has prevented any final disposition of the properties. The master, therefore, reports that the exceptants should be charged with one half of the costs of this proceeding accrued since the sale of February 20, 1884, in the proportion of their respective interests, the remaining one half to be paid by the estate of James Dundas, deceased."

June 27, 1885, the orphans' court sustained exceptions of appellants as to the imposition of costs upon the fund realized from the sale and suspended confirmation of the sales reported by the master until October 10, 1885. On that day a petition was presented to the orphans' court on behalf of the exceptants, praying for a further suspension of the confirmation of the sale of parcel No. 2 of the coal lands and of No. 3 of the Passyunk farm. This petition was refused, [4] and on the same day the sales of these lands were confirmed. [1, 3, 5–9]

October 31, 1885, Lucy Dundas petitioned that the decree of October 10, 1885, should be opened so as to set aside the sale of parcel No. 3 of the Passyunk farm and order a resale thereof upon an advanced bid of $20,000 made by Isaac N. Haley with security. January 2, 1886, the court dismissed this petition, [10–13] and at the same time confirmed the sale of tract No. 2 of the Passyunk farm to the executor for $3,100. [2]

A third sale was made under the supervision of the master on April 7, 1886, at which parcel No. 5 of the coal lands was sold to Calvin Pardee for $17,220. Tract No. 4 of the Passyunk farm was sold to the executor for $30,750 and tract No. 5 to J. G. Rosengarter for $43,000. All these sales were subsequently confirmed.

Upon the confirmation of these sales the appellants presented a petition to the court to have their counsel fees, costs of expert witnesses, and other expenses paid out of the fund. To this an answer was filed by J. Dundas Lippincott, Mrs. Agnes Dundas Lippincott, and Mrs. Anna M. Wurts—Dundas.

The court referred this petition and answer to the master, who reported in favor of allowing the claim of expert witnesses and costs to be paid out of the fund; he also reported that the counsel fee of $1,500 had been fully earned by counsel for appellants, but only allowed $500 out of the fund. The remainder of the counsel fee and the fee of one of the expert witnesses amounting to $1,050 were charged upon the shares of the appellants. The court dismissed exceptions to the master's findings as to costs. [19–25]

The assignments of error specified: (1, 3, 5–9) The decree of October 10, 1885; (2, 10–13) the decree of January 2, 1886; and (19–25) the dismissal of the exceptions to the master's finding as to costs.

Arthur M. Burton for appellants.

John J. Wilkinson, John G. Johnson, and *George W. Biddle* for appellee.

PER CURIAM:

This case was one addressing itself to the sound discretion of the court; and as that discretion was lawfully exercised we will not undertake to revise it.

Decree affirmed and appeal dismissed, at the costs of appellants.

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Ex. A. 6. P.
11/29/04.